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In the Supreme Court of the United States

October Term, 1931.

No. 485

CHAMPLIN REFINING COMPANY, *Appellant,*

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellees.*

No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellants,*

vs.

CHAMPLIN REFINING COMPANY, *Appellee.*

Brief for Appellees on the Appeal in No. 485, and for Appellants on the Cross-Appeal in No. 486.

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(36,299-36,300)

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IN THE SUPREME COURT OF THE UNITED STATES.

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No. 485

CHAMPLIN REFINING COMPANY, *Appellant,*

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellants.*

No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellants,*

vs.

CHAMPLIN REFINING COMPANY, *Appellee.*

BRIEF FOR APPELLEES ON THE APPEAL IN NO. 485, AND FOR APPELLANTS ON THE CROSS-APPEAL IN NO. 486.

May It Please the Court:

Statement of the Case.

Each of the parties in the District Court have appealed from the final decree (R. Vol. I, Pt. 2, p. 248). The two ap-

peals are presented on a single record and are argued and submitted together as one case. The appeal in No. 486 is a cross appeal.

The appeal in No. 486 was duly perfected, and a statement, particularly disclosing the basis on which it is contended this court has jurisdiction to review on appeal the judgment or decree below, has been filed in compliance with paragraph 1 of Rule 12.

In No. 485, the plaintiff below has appealed from so much of the decree as sustained the constitutional validity of certain sections of the statute of the State of Oklahoma, originally embraced in sections 1, 3, 4, 5, 6, 7 and 10 of the Act of the Oklahoma Legislature, Sessions Laws 1915, page 35, approved February 11, 1915 (quoted in brief for appellant Champlin Refining Company, pp. 2-6), and certain orders of the Corporation Commission made pursuant thereto (contained in part 2 of Vol. II of the record), and refusing to enjoin the enforcement thereof.

In No. 486, the defendants below have appealed from so much of said decree as perpetually enjoined and restrained them from enforcing or attempting to enforce the provisions of sections 8 and 9 of the said Act approved February 11, 1915 (R. Vol. I, Pt. 2, pp. 393-399). They filed their statement of points to be relied upon (R. *ibid* 412).

The case was heard and determined in the District Court by three judges, as required by section 266 of the Judicial Code (Sec. 380, U. S. C. A.), two of whom were circuit judges.

The court below, one judge dissenting to parts there-

of, adopted and filed findings of fact covering all issues of fact (R. Vol. I, Pt. 2, pp. 177-212).

The court, one judge dissenting in part, also separately stated and filed its conclusions of law (R. Vol. 1, Pt. 2, pp. 213-217).

There being a division of the court, two written opinions were filed, Circuit Judges Cotteral and Phillips expressing the majority opinion (R. Vol. I, Pt. 2, p. 218) and District Judge Kennamer expressing the minority view (R. Vol. I, Pt. 2, p. 229). 51 Fed. (2d) 823.

Beginning on page 7, and extending to page 31 of the brief of appellant, are statements of certain facts. We cannot agree to the correctness of these statements, except the quotations from the findings of the trial court on pages 8 and 9. There are inaccuracies and omissions therein. Some of the statements are off the record, and the remainder are counsel's interpretation and version of parts of the facts rather than the facts found by the trial court. In plaintiff's statement of the points to be relied upon in this court (R. Vol. I, Pt. 2, p. 406) none of said findings are questioned.

Since it will be necessary to consider the findings and evidence in connection with the various questions raised, we shall endeavor to state the pertinent facts in connection with the discussion of each question, which will fully develop the material points of disagreement.

At this place we content ourselves for a statement of the facts by reference to the findings of the trial court which are full and comprehensive, and the correctness of which, as stated, is not questioned in this court. Neither do the appellants in No. 486 question them.

However, in order to direct attention to the particular subject-matter around which the controversy revolves, we desire to say:

(a) Plaintiff below owns nine oil-producing wells located in the town-lot portion of what is known as the Oklahoma City pool. (Finding IV, R. Vol. I, Pt. 2, pp. 181-182.) Said pool is generally described in Finding VI (R. *ibid* 184-185). The 746 producing oil wells located therein, the daily potential capacity of which is 2,987,993 barrels of oil (when computed according to the revised formula adopted by the Commission, February 10, 1931, for determining the potentials of the wells in said pool; see Finding XIV, R. *ibid* 193-194), are under proration by orders, rules and regulations issued by the Oklahoma Corporation Commission under the said Act of the Oklahoma Legislature, commonly referred to as the Oklahoma Oil Conservation Act. As a result of the proration of said pool under said act, plaintiff, at the time of the trial below, was limited in the production of oil from its said wells (all others were likewise limited) to about six per cent of the potential production thereof. At that time, the amount of the market outlet for oil in said pool, that is, the amount which could be produced therefrom without waste as defined in the statute, was 185,000 barrels per day (R. Vol. I, pt. 2, p. 344), although it had increased to 200,000 barrels per day for the last four days of June, 1931, which resulted in an allowable production of 10% of potentials computed according to said formula (Finding XIX, *ibid* 195). However, for convenience and in discussing the facts of the case, we

shall treat the amount of the market demand and the allowable production as being 185,000 barrels per day.

(b) The plaintiff also owns nine oil-producing wells in the so-called "Greater Seminole Area," about 65 miles east of the Oklahoma City pool. This area is described generally in Finding VI *(ibid* 183-184). This area covers a large territory and consists of eight or more distinct and separated oil pools. Therein, there are 2,441 producing oil wells having a potential production of 564,908 barrels per day, and at the time of the trial, the market demand in all of the pools in said area was for about 175,000 barrels per day. In some of the pools in said area, the ratio between the potentials and the market demand is 50 per cent and the allowable production is 50 per cent of the potential of each well therein; in others, the ratio is different (Finding VI). (Incidentally there are 60,000 other wells of quite small capacity in many pools scattered over the state capable of producing about 250,000 barrels per day; R. Vol. II, Pt. 2, p. 133.)

The chief complaint of the plaintiff is that it is not allowed to operate *its nine wells in the Oklahoma City pool* to whatever extent it may choose; and that the operation and enforcement of this law constitutionally deprives it of that right. Therefore, this controversy centers around the proration of the wells in said Oklahoma City pool.

If in the discussion of the several questions, we at times repeat facts elsewhere stated, or go too much into detail, we trust that extenuation may be found in our desire to bring to the attention of the court each pertinent fact and fully support our statement thereof.

Answer to Appellant's Brief in No. 485.

NATURE OF THE RIGHTS OF OWNERS OF LAND IN OKLAHOMA, AND LESSEES THEREOF, FOR OIL AND GAS MINING PURPOSES.

Following the decision of this court in *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 44 L. ed. 729, the Supreme Court of Oklahoma has defined the right of an owner of land in that state, with respect to oil and gas, which may permeate the strata underlying the surface, substantially as follows:

> ***On account of their "vagrant and fugitive nature" constituting "a sort of subterranean ferae naturae," the owner of land has no absolute right or title to the oil or gas which may permeate the strata underlying the surface of the land, as in the case of coal or other solid minerals fixed in, and forming a part of, the soil itself. But with respect to such oil and gas, he has certain rights designated by some courts as a qualified ownership thereof, but which may be more accurately stated as the exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of the land, and explore therefor by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as may be found and obtained thereby.***
>
> —*Rich* v. *Doneghey*, 71 Okl. 204, 177 Pac. 86, 3 A. L. R. 352.

In the same decision, the Supreme Court of that state defined the right acquired by a lessee under an oil and gas lease, such as the appellant acquired in the lots and par-

cels of land described in the bill and set forth in the findings of the District Court (Findings of Fact III, R. Vol. I, Pt. 2, p. 179), which may be stated as follows:

> ***Under an oil and gas lease from the owner of land, the lessee acquires the right for the term of the lease, of operating for oil and gas on the land, which includes the right to explore therefor, and to extract therefrom and reduce to possession such as may be found. The lease is a grant of the exclusive right for the time specified, to take all the oil and gas that can be found by drilling wells on the particular tract, with the accompanying incidental right to occupy so much of the surface required to do those things necessary to the discovery of and for the enjoyment of the principal right to take oil or gas.***

The rule obtaining in Oklahoma is further stated by the state Supreme Court in that decision in substance as follows:

> ***A conveyance which in terms purports to grant all the oil and gas in place, by reason of the nature of those substances, vests no estate or title therein, but only the right to search for and reduce to possession such as may be found; and when reduced to possession, not merely discovered, title thereto and an estate therein as corporeal property will vest.***

In announcing the foregoing principles, the state Supreme Court reviewed and applied all of its previous decisions pertaining to the subject. On those points the decision has since been generally followed by that court and the United States courts in cases arising in that jurisdiction.

LEGISLATIVE POWER.

The production of oil from a common source of supply thereof is subject to regulation by a state under its police power.

To promote the general welfare, a state may by legislative enactment regulate the exercise of the correlative rights of land proprietors within a common source of supply of crude oil. No constitutional rights, state or federal, are invaded by such a regulation if it be reasonable and applies substantially alike to all similarly situated.

The decisions of this court leave no room for doubt as to the soundness of this statement.

—*Ohio Oil Co.* v. *Indiana*, 177 U. S. 190;
Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61;
Walls v. *Midland Carbon Co.*, 254 U. S. 300;
Bacon v. *Walker*, 204 U. S. 311;
Noble State Bank v. *Haskell*, 219 U. S. 104;
West v. *Kansas Natural Gas Co.*, 221 U. S. 229;
Bandini Petroleum Co. v. *Superior Court*, ... U. S. ..., No. 43, October, 1931, term.

Petitions for writs of certiorari were denied in two important cases involving regulations of this kind.

—*Oxford Oil Company* v. *Atlantic Oil & Producing Co.*, (C. C. A. 5) 22 Fed. (2d) 597, *certiorari* denied, 277 U. S. 585;

wherein the court sustained the validity and declared the reasonableness of a rule promulgated by the Railroad Commission of Texas with reference to the spacing and location

of oil wells on the ground, and sustained a special order of the said Commission limiting the number of wells to four upon a strip of ground in Texas more than 3000 feet long and about 45 feet in width, and denied the contention of the lessee that it was deprived of constitutional rights in not being allowed to drill and operate as many as ten wells on said strip of land.

—*Marrs* v. *City of Oxford,* (C. C. A. 8) 32 Fed. (2d) 138, *certiorari* denied, 280 U. S. 573,

sustained the constitutional validity of an ordinance of the City of Oxford, Kansas, requiring in substance and effect the unit operation of all the lots within any city block, an oil pool having encroached upon the city limits, by prohibiting the drilling of more than one well within the block for the drilling of which a permit was required to be obtained, and providing that all lot owners and their lessees on lots other than the one covered by a permit might ratably share in the production from the one well upon contributing their ratable proportionate parts of the cost of drilling and operating the well.

The Supreme Court of the State of Oklahoma, in *C. C. Julian Oil & Royalties Co.* v. *Capshaw,* 145 Okl. 237, 292 Pac. 841, followed the decision of this court in the *Ohio Oil Company,* the *Lindsley* and the *Walls* cases, and defined the correlative rights of the several owners of separate tracts of land in Oklahoma, overlying a common pool or source of supply of oil, with respect to oil and gas therein, and the power of the state to regulate such rights. Therein said court, sustaining the validity of the act herein in ques-

tion, as a valid exercise of the legislative police power, in the fourth syllabus prepared by the court, said:

> "The surface owners of land have the right to drill for and reduce to possession the oil and gas beneath; but this right is to all of the owners alik. nd when numerous surface owners seek to produce from a common pool it is within the police power of the state, in keeping with due process of law, to require the several surface owners to produce same under reasonable regulations to the end that some of said owners may not take from the common source more than their equitable share."

Said case involved some among the present series of orders of the Corporation Commission affecting the Oklahoma City field.

Under the law of Oklahoma, Sec. 803, C. O. S. 1921, a syllabus of the points of law decided in any case in the Supreme Court of the state shall be stated, in writing, and filed among the papers in the case, but shall be confined to points of law arising from the facts in the case, that have been determined by the court. The syllabus so prepared is the law as adopted by the court.

—*McDonald* v. *Stiles,* 7 Okl. 327.

LEGISLATIVE DISCRETION.

The legislature of Oklahoma possessed authority to determine and select the means to be adopted to accomplish conservation and the protection of the correlative rights of the landowners in the oil pools of the state.

Many times this court has announced the rule that the

choice of the means to achieve a purpose which it is competent for government to effect is a matter of legislative discretion, and where the choice made bears a reasonable relation to the purpose in view, the exercise of the discretion is not subject to judicial review. Whether it is wise or unwise, whether it is the best or the poorest, are not questions with which the courts are concerned in passing judgment upon the power to prescribe them or their enforcement according to the means selected.

—*Chi. B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 569, 55 L. ed. 338, 339;

Block v. *Hirsh,* 256 U. S. 135, 65 L. ed. 865, 872;

Ohio Oil Co. v. *Indiana, supra;*

Walls v. *Midland Carbon Co., supra.*

Fairly debatable questions as to the reasonableness, wisdom and propriety of the legislative determination are not for the courts, but for the legislative body.

—*Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 73 L. ed. 856;

Jacobson v. *Massachusetts,* 197 U. S. 11, 49 L. ed. 643.

The same principle governs in passing judgment upon the particular rules and regulations which, acting within the scope of its authority, the Corporation Commission has promulgated for the enforcement of the law.

THE CORRELATION OF THE SEVERAL PROVISIONS OF THE OKLAHOMA OIL PRORATION LAW AND THE CONDITIONS WHICH INVOKED THEIR ENACTMENT.

The validity of section 2 of the act (Sec. 7955, C. O. S. 1921), as we shall point out in the course of the argument, is not involved in this suit. The orders of the Corporation Commission complained of herein were not issued thereunder or based thereon. (Finding X, R. Vol. I, Pt. 2, p. 189; Finding XXVIII, *ibid* 207, 210.)

In the enactment of the statutes involved in this suit (quoted plaintiff's brief, pp. 2-6), it was for the Oklahoma Legislature to decide from its general information, and from facts specially brought to its attention, the nature of the evils actually present or threatening and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful to courts in interpreting the effect and scope of statutes, in order to determine their validity to know the conditions under which the legislature acted. *Stafford* v. *Wallace,* 258 U. S. 495, 513.

Waste incident to production in excess of transportation or marketing facilities or reasonable market demands.

Section 7954 (Sec. 1, Original Act) in general terms prohibits the production of crude oil or petroleum in the state, in such manner and under such conditions as to constitute waste. Section 7955 (Sec. 3, Original Act) defines waste to include that "incident to the production of crude oil or petroleum in excess of transportation or marketing facilities, or reasonable market demands." In other words,

the legislature declared the production of oil in excess of transportation or marketing facilities to be waste. It also declared production of oil in excess of reasonable market demands to be waste.

At the time of the enactment of these statutes, as now, the uses for crude oil or petroleum in their natural state were and are limited. It must be processed or refined. There are established refineries throughout the country. These furnish practically the whole market for crude oil. The principal refineries are generally remote from the chief sources of production. While there is some transportation of oil in tank cars by railway from the oil fields to the refineries, the usual and by far the more economical method of transportation is by pipe line systems (the average difference in cost throughout the country in 1914 was fifty cents per barrel in favor of the pipe line; R. Vol. II, Pt. 3, p. 252). In transportation by pipe line the oil is received directly from the tanks at the wells, and ultimately delivered by the pipe line into the tanks at the refineries. The three important stages in the process of securing the beneficial use of the products of crude oil, are, its production, its transportation by pipe line to the refineries, and its processing at the refineries. Nearly all refining companies own, or directly control through subsidiary or affiliated companies, the pipe lines extending from the refinery to the source of supply. Many of them are also themselves, or through subsidiary or affiliated companies, producers of oil. These are known as "integrated producers."

But as the petroleum industry was constituted in 1915, and still is *(e.g.,* the Seminole area, plft.'s Ex. 14, R. Vol. II, Pt. 1, pp. 6-9; the Oklahoma City pool, plft.'s Ex. 18, R. *ibid,* pp. 12-13), the great majority of well owners, operators or producers were "non-integrated," that is, performed the sole function of producing crude oil, and did not own or control pipe lines or other transportation or marketing facilities, or refineries for processing the oil and preparing its products for consumption. These non-integrated producers were and are dependent on the refiners, or middlemen, owning or affiliated with others owning the pipe line or transportation facilities, for a market for their production. Usually the purchasers were and are producers from the same common source of supply.

As long as the pipe line facilities are sufficient to transport the full production from a common source of supply, and the refineries to which the oil is sold and transported are able and willing to purchase all the production of the non-integrated producers in addition to taking that of their own or affiliated companies, the business proceeds smoothly without serious injury to the rights of any producer. But, when either the full production from a common source of supply exceeds the pipe line transportation or marketing facilities, or although such facilities are adequate, if the full production exceeds the market demands, that is, if the refineries are unable or unwilling to take the full production; then in the absence of regulation by the state, certain evils arise and injuries are suffered by all producers, but principally by the non-integrated ones.

When the Fifth Legislature of Oklahoma convened in January, 1915, the evil consequences of such production in excess of transportation or marketing facilities or reasonable market demands had been but recently demonstrated by the occurrences in the Cushing and Healdton fields, and like occurrences in the Glenn Pool of an earlier day had not been forgotten. The evil conditions attending such excessive production were developed in hearings before the Corporation Commission in 1914, when it was attempting to afford a remedy therefor under its then limited and doubtful powers, and also in hearings soon after the Act of February 11, 1915, was approved.

Some of the facts developed at these hearings were recited in orders made by the Commission during that period. These orders are in evidence here. See, Order 829 (R. Vol. II, Pt. 4, p. 432), Order No. 846 (R. Vol. II, Pt. 3, p. 247), Order 878 (R. Vol. II, Pt. 4, p. 437), Order 920 (R. Vol. II, Pt. 4, p. 440). We shall quote parts of these.

At the hearing before the District Court in January, 1931, on the application for a temporary injunction, a transcript of the testimony taken at the hearings before the Corporation Commission in October, 1930, was introduced in evidence. At the request of the court, each of the parties submitted an abstract of that portion of said evidence which pertained to the question of waste. By agreement, this abstract was introduced on the final hearing. Many of the witnesses testified to the conditions of waste attending the production in excess of market demands in times past, and the probability thereof at present (R. Vol. II, Pt. 4, pp. 316-363).

From these sources we learn, as recited by the Commission in 1914 in Order 846:

> "In times past when a crude oil pool was discovered in Oklahoma, some of the pipe lines on a very small tract in or near the center of a pool extracted an undue proportion of the oil from their own properties and refused to buy from other producers within the same pool." (R. Vol. II, Pt. 3, p. 253.)

Referring to the results of the mad rush in the Glenn Pool, to get as much oil and as quickly as possible, Mr. Blatchley, author of Technical Paper 45, published in 1913 by the Bureau of Mines (pp. 23-24), stated:

> "As one man confidentially put it, 'More waste oil had run down the creeks from the famous Glenn Pool than was ever produced in Illinois'."

In its Order 846 of September 22, 1914, the Commission said:

> "There are ten million barrels of oil now stored in the Cushing field, the deterioration of which will range from ten to twenty-five per cent, the first year. Hence there is from one to two and a half million barrels of oil destroyed by this process. Many barrels go down the creek and are destroyed in various ways." (R. Vol. II, Pt. 3, p. 262.)

In the course of the same order, the Commission said:

> "With the helplessness of the oil producer in materially curtailing the production and holding his oil in the ground until such times as the transportation facilities and market conditions will care for it, he is forced to store it at a cost of approximately thirty

cents per barrel, including loss the first six months by evaporation." (R. Vol. II, Pt. 3, p. 255.)

In its Order 920 of June 5, 1915, shortly after the law became effective, referring to conditions existing at Healdton prior thereto, the Commission stated that it had ascertained that at one time more than six hundred thousand barrels of oil had been placed in earthen storage, and that much of this earthen storage was carried off by the floods to the great injury of crops, vegetation and stock water supply (R. Vol. II, Pt. 4, p. 442).

It was further recited therein:

> "Within sixty days prior to the hearing, there had been from one hundred and fifty to two hundred thousand barrels of oil taken from the field under what is known as 'common carrier' runs to the Pierce-Fordyce Refinery at Fort Worth. The evidence further disclosed that certain properties had been producing oil greatly in excess of the pro rata amount based on the average daily consumption; that the 150,000 barrels of oil which had been run as 'common carrier' runs were produced by one property of comparatively small acreage."

The Commission further said, touching on "economic waste," included in the statutory definition:

> "It may be insisted that the wells in the Healdton field may be operated at their maximum capacity and the oil placed in steel storage. Such storage in the Healdton field with one year's insurance costs approximately 25 cents per barrel. The maximum market price for oil in that field is now 30 cents per barrel. Even though there was no waste of oil in steel tankage by

evaporation this practice would border on economic waste as between the producers. Should one producer or several producers force the other producers to install steel storage when the oil placed therein is worth but little more than the cost of storage and practically cause the producer to lose all of his rights in the proper production of oil from the common source of supply? We believe this would be economic waste." (R. Vol. II, Pt. 4, p. 454.)

It may be observed in this connection that at the time of the trial herein the price of oil was thirty-five cents per barrel, and cost of storing oil in modern tanks was twenty-five cents per barrel, besides the cost of insurance, and that in the most modern type of storage tank, the loss by volume the first year is one per cent, and that there is a small continuous deterioration in quality due to the loss of gasoline content. (Wiggins, R. Vol. I, Pt. 2, p. 272.)

The significant physical fact of the power of migration of oil and gas, and the well-known disposition of mankind to assert and exercise their "rights" to the fullest extent, especially if by so doing they can advance, if only temporarily, their own interests, and the corresponding disposition to defend any invasion of their "rights," are the principal contributing causes to the conditions that have always been brought about and always will be brought about, unless regulated by law, by the production of oil in excess either of transportation and marketing facilities, or in excess of reasonable market demands. *Nearly all men can recognize the abstract merit of the ethical concept of oil production, which is that each producer from an oil pool is entitled to enjoy a fair and equitable share of the recover-*

able oil and gas from the pool over which his land is located, but all men cannot be trusted to act on that concept when opposed to self-interest.

The physical facts of the power of involuntary transmission of oil and gas in the natural reservoir, has been recognized and stated by this court in *Ohio Oil Co.* v. *Indiana, supra,* and other decisions. That fact, as well as the characteristic of man alluded to, were known and recognized by the Oklahoma Legislature in dealing with the problem.

In its Order 846 of September 22, 1914, the Commission observed, among other things:

> "Crude oil * * * is found underneath the surface of the ground in pools or strata and the production therefrom is not uniform. For a period the production will decrease rapidly; suddenly a new pool of oil is found and the production in localities greatly exceeds the transportation facilities, while at the same time the total production through the country may not be greatly increased and in other sections of the country there may be a corresponding decrease. The producer of oil is practically helpless as to the number of wells he may drill or the amount of oil he may produce; oil either being in a common pool or flowing beneath the ground may be taken not only from the owner of the land upon which the well is located but may, through this opening, be extracted from other lands, hence the owners of adjoining properties must drill an equal number of wells along either side of the line separating the two properties, and if the wells are kept flowing on one property, the other must be kept flowing in order that each may extract from the ground their

reasonable pro rata of the oil." (R. Vol. II, Pt. 3, p. 248.)

The Commission further said:

> "Anything that demoralizes a whole industry to such an unnatural and unreasonable extent should, in some way, be controlled by public authority. If this oil could be conserved and used as demands may justify, the public could continue to buy gasoline and kerosene at a reasonable price. No individual or half dozen individual oil producers in the Cushing field can control the situation. They are carried along in a whirlpool of production as helpless as a child in mid-stream and cannot prevent the inevitable result. They cannot even protect their own property *by holding the oil until such times as market and transportation conditions will properly care for the same.*" (R. Vol. II, Pt. 3, p. 261.)

In a supplement to that order, the Commission finally said:

> "After two days' hearings of the conditions attending the production of oil and the situation generally in Oklahoma, the Commission has arrived at the conclusion that no substantial relief can be given by any power or authority without a reasonable limitation on production; that is, protecting one producer against the other." (R. Vol. II, Pt. 3, p. 245.)

The District Court summed up and recited the foregoing facts in Finding VII (R. Vol. I, Pt. 2, p. 185), which was concurred in by the dissenting judge as substantially correct (R. Vol. I, Pt. 2, p. 212).

So the legislature, in the light of these and perhaps other facts, defined waste to include "waste *incident* to the production of crude oil or petroleum in excess of trans-

portation or marketing facilities," and also "waste incident to the production of crude oil or petroleum in excess of * * * reasonable market demands." This clearly comprehends as well "economic waste" *(e.g.,* expense of steel storage and risk of loss by fire), and "surface waste" (loss by seepage, evaporation and washing away from earthen storage). To conserve the rights of all having the privilege to produce from a common source of supply and protect the collective owners, by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession, it was provided in section 7957 (Sec. 4 of Original Act):

> "That whenever the full production from any common source of supply of crude oil or petroleum in this state can only be obtained under conditions constituting waste as herein defined" *(e.g.,* when in excess of either transportation or marketing facilities, or reasonable market demands) "then any person, firm or corporation, having the right to drill into and produce oil from any common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom without waste" *(e.g.,* either the amount of the transportation and marketing facilities, or reasonable market demands, as the case may be) "as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply."

There is also in this section an additional provision conferring jurisdiction on the Corporation Commission to make regulations to the end of preventing unfair or inequitable taking, and unjust discrimination between common sources of supply.

It appears rather clearly that the statute has accomplished its purpose in this regard. Under it, production was first regulated in the Healdton field in 1915. In Order 937, September 1, 1915, the Commission said:

> "On June 5, 1915, the Commission issued an order under said act (Order No. 920, Cause No. 2287) and immediately put the same into effect. At this time a conservation agent appointed by the Commission is in the Healdton field and the order is working admirably. Whereas, before the passage of the act some producers obtained a market and others had none—and found pipe line facilities available for themselves but not for others—and were enabled to draw heavily from the common sources of supply, now actual production is restrained or held back to that part of the potential production necessary for the daily market demands, in which every operator now participates according to his pro rata." (Eighth and Ninth Annual Reports of Corporation Commission of the State of Oklahoma, pp. 287, 315.)

The above referred to abstract of the testimony taken by the Commission in October, 1930, shows that notwithstanding the potential production in excess of market demand in each, the Seminole and the Oklahoma City field in 1930, was far greater than that in either the Cushing or the Healdton field in 1914-1915 prior to the enactment of the law, yet, under the operation of this law, there has been no recurrence of the deplorable conditions that had preceded its enactment and called it into existence.

Excessive production of oil is accompanied by the waste of gas.

The co-existence of oil and gas in the same reservoir is a matter of common knowledge. The two are necessarily produced together. For years, this gas, called casinghead gas, had no known commercial value. In those years, practically all of this gas was allowed to dissipate in the air and go to waste. Later, this gas was found to have a commercial value, and in producing the maximum amount of the more commercially valuable oil of which the wells were capable, large quantities of such gas were produced in excess of that which could be utilized and the surplus went to waste.

Mr. Blatchley, author of *Technical Paper 45*, written in January, 1913, and published in that year by the Bureau of Mines, mentions several instances of allowing tremendous quantities of gas produced by oil wells in several of the pools in Oklahoma to be discharged in the air. For example, he states (page 25) that in the Copan field, the original flow of gas is said to have been 3,000,000 cubic feet daily, that water entered the oil strata and that portions of the field were drowned at the time he wrote. He states (page 34) that the Glenpool field, discovered in 1906, "is one of the greatest oil and gas pools that has ever been developed" and that "a large number of the wells produce large volumes of gas both from above and in the oil sand." He says that billions, perhaps as high as 50,000,000,000 cubic feet of gas was wasted; that many wells with initial volumes of from 10,000,000 to 30,000,000 cubic feet flowed wide open

for periods of from 1 to 8 weeks. On subsequent pages, he described the waste of gas in a number of other pools in the state.

Casinghead gas has a gasoline content, a very volatile form of gasoline. It possesses a commercial value for use in blending with gasoline manufactured from crude oil. Several years ago, the business of extracting the gasoline from this gas was begun and it has grown until now it alone is a very substantial industry. But, because of the comparatively short period, often not exceeding a year, of flush production in new oil pools, plants capable of manufacturing the full amount of such casinghead gas available in such oil pools during their flush production period are not, for obvious economic reasons, constructed, but plants sufficient only to utilize the amount produced when the pool has passed its flush stage. Thus, it appears that one of the beneficial results, to those having the privilege of producing from a common source of supply of oil, of limiting the production of oil therefrom during the flush stage of the pool, is to enable the producers to secure the value of the utilization of great quantities of casinghead gas for gasoline manufacture that would otherwise necessarily be wasted.

This is demonstrated by the testimony of Mr. D. B. Dow, a petroleum engineer. He testified (R. Vol. I, Pt. 2, p. 363) to the capacity of the casinghead gasoline plants in the Oklahoma City field, the daily production of casinghead gas being in said field at the time of the trial under the then existing proration orders, and the value thereof,

and the ability of the plants to handle the then existing peak production of gas from all the wells in the field, which thus secured to every operator an opportunity to realize the value of the casinghead gas produced by him along with his proportionate share of the oil. Mr. Dow also stated the enormous quantity of gas and its gasoline content that would be produced and necessarily wasted during the first year after the wells were opened up if produced to maximum capacity. According to his calculation, the value of the gasoline alone that would be wasted, at the then prevailing low prices, was $1,848,750.00. And if the value of the residue gas be included, the amount would be $29,400,000.00.

The District Court found that the evidence adduced at the trial established that the curtailment plan adopted by the Commission in the basic order of the existing series (No. 5369, dated October 28, 1930) will tend to conserve natural gas as stated by the Commission in the order. (Finding of Fact XXI, R. Vol. I, Pt. 2, p. 197.)

Underground Waste.

There is another type of waste that may occur as incident to the full production from a common source of supply, which is denominated in the statute as "underground waste." Underground waste means oil wasted underground, that is, oil left in the natural reservoir unrecovered when the wells can no longer be properly operated and are finally abandoned, but which could have been recovered by proper operations. Necessarily oil so left that might have been recovered results in loss and injury to those having the privilege to produce from the reservoir.

It is a matter of common knowledge that not all of the oil in any formation is recoverable. We are told that for many years in many fields not exceeding 20% of the reservoir content was recovered. (*People v. Associated Oil Co. of Calif.*, 294 Pac. 717-724.)

In Bulletin 148, Petroleum Technology 37, entitled "Methods for Increasing Recovery from Oil Fields," by J. D. Lewis, published by the Bureau of Mines in 1917, the author, under a subheading entitled "Proportion of Oil Left Underground" (page 25) at page 30, states:

> "The total oil marketed from Oklahoma up to 1915 has been about 462,000,000 barrels, to which 38,875 wells have contributed. The marketed production in 1914 was 73,631,724 barrels from 27,794 wells, and the future production can be reasonably estimated not to exceed 300,000,000 barrels, a total of 762,000,000 barrels. From a record of over 6,000 wells on the lands of restricted Indians it is found that there is on the average one well to each 5.7 acres, at which figure the total producing acreage in Oklahoma is not over 225,000 acres, *and the production per acre will approximate 3,400 barrels, which would not saturate 3 feet of sand of the estimated porosity, although the average thickness of the oil sands in Oklahoma is many times greater.*"

The petroleum industry has devoted untiring efforts and millions of dollars to the problem of increasing the percentage of recovery, and thus decrease underground waste. Agencies of the government have for years devoted their energies to the problem. It has been learned that the ultimate recovery of oil can be increased by the improved

methods of drilling, casing and equipping wells so as to prevent the escape of gas energy, hereafter referred to, into other formations and intrusion of water into the reservoir from other sources. (See, also, Technical Paper 130, Petroleum Technology 30, entitled "Underground Wastes in Oil and Gas Fields and Methods of Prevention," by McMurray and Lewis, Bureau of Mines, 1916.) Under authority conferred by law, the Corporation Commission of Oklahoma made rules and regulations governing those matters by its Order 1299 entered July 16, 1917, and which have been amended and supplemented from time to time since.

As early as 1913 it was learned that, in addition to the commercial value of casinghead gas, that is, gas produced with the oil, in and of itself as a product of an oil well, *such gas had an even greater value in its function in the recovery of oil from the ground.*

Since the early days of the oil industry, it has been known that there is an expulsive force in every newly opened pool, which for a while drives the oil and gas out of the reservoir with great rapidity. In the early days, the nature of this force was not appreciated. It was called "rock pressure." It was known to exist and in many instances it was observed that it quickly disappeared. Producers hastened to fully utilize this pressure while it lasted. It seems to have been thought that the more expeditious its utilization, the greater the ultimate recovery of oil. But, at least as early as 1913, scientists learned more of the nature of this force, and that there were better methods

of its utilization in the recovery of the maximum amount of oil than its free and unrestricted use and consequent rapid exhaustion.

Petroleum engineers now refer to this force as "reservoir energy."

"Reservoir energy" is a natural force or power which exists in the reservoir where the oil and its accompanying gas have accumulated. It is sometimes referred to as "gas energy." Its existence is due to a combination of elements and conditions in the reservoir where the oil and gas, far below the surface, are held under high pressure.

An oil pool, or a common source of supply of crude oil, the thing referred to in section 4 of the act here in question, consists of an accumulation of oil in the pores of folds in strata of sedimentary rocks. It is covered by an impervious formation through which neither the oil nor its accompanying gas can rise to higher levels until penetrated by the drilling of wells. Beneath the oil and gas and/or around the lower outer edges of the pool, water, usually salt-water, has accumulated in like pores of the rock. The stratum containing the water often extends, unbroken, for long distances away from the pool. It produces a hydrostatic head pressure on the oil and gas. L. G. Huntley says that the accumulation of oil is in a "practically sealed reservoir." (Bureau of Mines, Technical Paper 51, Possible Causes of the Decline of Oil Wells, 1913, by L. G. Huntley.)

In addition to the gas in solution with the oil, sometimes free gas has accumulated at high points in the reservoir. (Arnold, R. Vol. I, Pt. 2, pp. 320-329; McWilliams,

ibid, p. 341.) The gas, when it is not in solution with the oil, being lighter than the oil, is in the top of the structure; the oil, being lighter than the water, is positioned above the water and then the water is in the base of the reservoir or around the lower outer edges thereof. (McWilliams, R. Vol. I, Pt. 2, p. 340; Bureau of Mines, Technical Paper 130, 1916, Underground Wastes in Oil and Gas Fields and Methods of Prevention, by McMurray and Lewis, p. 25.)

The amount of the pressure varies with variations in the depths beneath the surface at which the accumulation has occurred. It is said that the increase is at the rate of about thirty-five pounds per square inch for each one hundred feet of increase in depth. At Oklahoma City, where the reservoirs containing the oil and gas have been found at about 6500 feet below the surface, the pressure was originally about 2400 pounds to the square inch (Clifton, R. Vol. I, Pt. 2, pp. 266-267).

Pressure compresses gas. By reason of this pressure both the gas in solution and the free gas are highly compressed and seek an opportunity to escape. Gas in solution with oil very greatly decreases the viscosity of the oil and increases its ability and tendency to move through the small pores of the rock containing it. (McWilliams, R. Vol. I, Pt. 2, pp. 340, 343, 348.) As the gas and oil are released through wells, the water forces its way in. Gas moves more freely through the sand pores than the oil or the water, and the water moves more freely than the oil (McWilliams, *ibid).*

The result is that if there is an inordinate release of pressure by an excessive production from a well, the gas

and oil about the well rush out too fast for surrounding oil to move in, and the water intrudes into the spaces of least pressure, the partially vacated pores, and it often comes to the well bore in advance of the surrounding oil, thus causing what is termed "coning." Also "channeling" occurs; and from coning and channeling, oil is sealed off and becomes unrecoverable; whereas, if the flow of the well is properly retarded, the water will retain its position beneath or around the accumulated oil, and cause the oil to flow ahead and upwards so that the percentage of its ultimate recovery is greatly increased. Combination of gas carriage and water drive is obtainable only by means of a retarded operation of the wells in the field during the natural flow period. These facts were developed in the trial, see testimony of J. R. McWilliams (R. Vol. I, Pt. 2, p. 340) and E. R. Guidinger (R. Vol. I, Pt. 2, p. 394).

Mr. McWilliams testified " • • • if you will take your oil out and gas sufficiently slow so your water encroaches symmetrically then you will materially increase your ultimate recovery" *(ibid* 341), also, "in order to accomplish the greatest ultimate recovery, each well should be operated at approximately the same percentage of its maximum capacity" *(ibid* 341).

Mr. Guidinger, referring to the matter of securing the greatest ultimate recovery in the Oklahoma City field by the proper utilization of gas energy, said, "I think the best method to operate the wells in this field is to have the wells produce under a restricted rate of flow under the same percentage of their potential capacity." (R. *ibid* 351-352.)

The effect of the waste of gas produced by oil wells in Oklahoma, such as is described by Mr. Blatchley, *supra*, was explained by Mr. Huntley, when, in his paper (Technical Paper No. 51, 1913) dealing with the subject of the efficient utilization of what is now called "reservoir energy," at page 7 he said:

> "The practice of allowing the free escape of vapors instead of endeavoring to make each cubic foot of gas in expanding perform its quota of work in the expulsion of liquid petroleum, is a direct cause of the decline of flowing wells. It is almost as direct a factor in the decline of pumping wells as the intrastrata gas pressure is the means of keeping up the continuous movement of the fluid toward the well when the well is pumped.
>
> "As another indirect effect, may be mentioned the flooding of oil pools by water, owing to the injudicious rapidity with which the gas is drained from the pool. The rapid exhaustion of the gas in a certain part of the field may remove the only influence retarding the encroachment of water, which may, by a flanking movement, cut off a large section of the producing area. Or water may exist in the lower part of the oil sand, being held in check only by the rock pressure of the gas. If each cubic foot of gas were retained to perform its work of expelling petroleum, the pressure would help to retard the water for a considerable period, or until the maximum amount of oil had been recovered."

It therefore appears that full production from a common source of supply may cause underground waste, as well as waste incident to the production of oil in excess of transportation and marketing facilities or reasonable market demands.

It may very well be that a condition would exist where the transportation and marketing facilities were adequate and the market demands sufficient to absorb the full production of a pool, yet, to permit such full production would result in otherwise recoverable oil being left in the ground and thus result in underground waste, and that in order to protect the rights of all the collective owners against such waste by any of them, the production should be limited within the limits that would secure a full utilization of the reservoir energy and the production should be apportioned so that each having the privilege to produce would secure his just proportion of the reservoir energy. For example, if there were a demand for the full production of the Oklahoma City pool most serious underground waste would result if it were supplied. (Arnold, R. Vol. I, Pt. 2, p. 324; McWilliams, *ibid*, p. 343; Guidinger, *ibid* 352.)

The District Court found that the evidence established that the curtailment of production in October, 1930, by Order 5369, under the authority of this act, would, as stated in the order "tend to conserve * * * gas pressure." (Finding of Fact XXI, R. Vol. I, Pt. 2, p. 197.) In their opinion, Circuit Judges COTTERAL and PHILLIPS, said:

> "Furthermore, it is established by the evidence that to permit oil wells to flow at their maximum flush production results in the use of an excessive amount of gas pressure, an uneconomical and wasteful use of gas energy in lifting the oil, and a tremendous loss in ultimate recovery." (R. Vol. I, Pt. 2, pp. 224, 225.)

Summary of the Purpose of the Statute.

The facts and circumstances hereinabove recited bring the statute in question within the test of reasonableness laid down by this court and establish that it is not only reasonable but also that it is doubtless one of the best systems which could be adopted to attain the ends in view.

The evident purpose of the legislature in the enactment of said law was to secure to all persons having the right to produce from a common source of supply, a just distribution among them to arise from the enjoyment by them of their privilege to reduce to possession. *(Ohio Oil Co.* v. *Indiana, supra.)*

It is evident that without a regulation of the type prescribed by this law, an individual owner is powerless to secure such distribution whenever the full production to be had from a common source of supply *(a)* exceeds the transportation or marketing facilities; or *(b)* exceeds the reasonable market demands for oil therein, or *(c)* exceeds the proper amount for the efficient utilization of the reservoir energy.

THE PARTICULAR REGULATIONS PRESCRIBED BY THE ACT IN QUESTION BEAR A REASONABLE RELATION TO THE PREVENTION OF WASTE AND THE PROTECTION OF THE CORRELATIVE RIGHTS OF THE LAND PROPRIETORS IN A COMMON SOURCE OF SUPPLY OF OIL.

The Test of Reasonableness.

A police regulation which bears a reasonable relation to an object within the governmental authority is valid.

The recognized test of reasonableness was laid down by this court in *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, when it said:

> "And the validity of the police regulations, whether established directly by the state or by some public body acting under its sanction must depend on the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public policy."

This test was applied by this court in passing upon the validity of the Indiana statute involved in the case of *Ohio Oil Company* v. *Indiana, supra;* the sheep-grazing statute of Idaho in *Bacon* v. *Walker, supra;* the New York mineral water statute in the case of *Lindsley* v. *Natural Carbonic Gas Company, supra.*

The requirement for proportional production, a percentage of the potential capacity of each well in a pool, is reasonable.

Section 4 of the Oklahoma statute is patterned on what this court said could be done in the case of *Ohio Oil Company* v. *Indiana.*

By this statute a "just distribution" to arise from an exercise of the right to reduce to possession is sought to be attained.

In the *Ohio Oil Company* case, it was said:

> "Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose

of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and reach the like end by preventing waste."

In the *Lindsley* case, it was said of the New York statute:

> "*Thus these pumping operations generally result in an unreasonable and wasteful depletion of the common supply and in a corresponding injury to others equally entitled to resort to it.* It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of the pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, *so regulates its exercise as reasonably to conserve the interests of all who possess it.* That the state, consistently with due process of law, may do this, is a necessary conclusion from the decision in the case cited. But were the question an open one, we still should solve it in the same way." (Italics ours.)

In the *West* case, speaking of the decision in the *Ohio Oil Company* case, it was said:

> "The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. *Its purpose was to secure to the common owners of the gas a proportionate acquisition of it—a reduction to possession and property—not to take away any right of use or disposition after it had thus become property.* It was

sustained because such was its purpose; * * * " (Italics ours.)

In the *Walls* case, speaking of the *Ohio Oil Company* case, it was said:

> *"It was decided, however, that before that event occurs, indeed, in prevention of it, the state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and advance the public interest."* (Italics ours.)

In *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388-389, 71 L. ed. 303, 311, this court said:

> "The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity."

In *Bacon* v. *Walker*, 204 U. S. 311, 317, speaking of the 2-mile limit in the Idaho sheep-grazing statute, this court said that,

> "The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose."

Neither the Indiana nor the New York statute required ratable taking; but the Oklahoma Statute does require it, and thus it does that which this court has declared a legislature may do. It precludes a disproportionate part from being attributed to one or more of the surface owners to the detriment of others.

Section 4 of the Oklahoma Statute prescribes a standard of conduct or criterion to guide producers from a com-

mon source of supply of crude oil in all cases where the full potential production of all the wells in the pool can be obtained only under conditions constituting waste as defined in the act.

The 1914 orders of the Corporation Commission (Order 829, July 1, 1914, R. Vol. II, Pt. 4, p. 432; Order 846, September 22, 1914, R. *ibid*, Pt. 2, pp. 247, 257), disclose that the Commission, prior to the enactment of this law by the legislature, had carefully considered the *Ohio Oil Company* opinion, and thus the Commission, with this case as its guide, pointed the way to the relief which could be granted. It is logical to conclude that the legislature also, and with equal earnestness, considered said case and attempted to enact a law which would grant the very relief which this court had already held could be granted.

Four months after this law was enacted, the Commission, in connection with the promulgation of regulations for prorating the Healdton pool, considered the insistence by some that the law was unconstitutional, and it quoted extensively from the *Ohio Oil Company* opinion (Order 920, June 5, 1915, R. Vol. II, Pt. 4, pp. 440, 446-452) and from the *Lindsley* case and the *West* case (p. 451) and held:

> "Sections 3 and 4 of the act come clearly within the language of Chief Justice WHITE in that the object is to protect the common owners who have a right to take oil from the common source of supply, that those who have pipe lines or markets may not totally destroy the rights of others who may not be so fortunately situated."

To provide that each producer may produce from his wells only that percentage of the potential capacity thereof, whenever the full production of all the wells in the pool cannot be had without waste, which corresponds to the ratio between the total potential of all wells in the pool and the amount which can be produced from the pool without waste, places all producers upon the same basis.

A limitation of production from a common source of supply to the amount of the reasonable market demand for oil therefrom, accompanied by a requirement for proportional oil production by all proprietors therein, is reasonable.

In the *Ohio Oil Company* case the court graphically described with prophetic vision the *possibility* of injury, should one producer operate his wells excessively. In the *Lindsley* case and in quotations made from the Supreme Court of Idaho in the case of *Bacon* v. *Walker,* the actual occurrence of the injuries before the law was passed were mentioned or described. In the *Ohio Oil Company* case this court said:

> "No one owner of the surface of the earth, within the area beneath which the gas and oil move can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners."

The court placed emphasis upon the *use* by one proprietor of his *power* to seek to convert a part of the common

fund to actual possession, and said that such use "*may* result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder." It was held that because of the possibility of the exercise of such power, the legislature had authority to enact laws for protecting all of the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession.

The conditions existing in 1914 and 1915 demonstrate the reasonableness and necessity of this limitation.

We have seen, from our recitation of the conditions which led to the passage of this law, that in the oil fields in Oklahoma, prior to the enactment of the law in question, *the very things came to pass* which this court in the opinion by Chief Justice WHITE said were possible of occurrence.

The history of the times shows not only the reasonableness of, but also a necessity for, the limitation of the total production of a pool to the amount of the transportation and marketing facilities therein or the reasonable market demand in order to afford a basis for ratable production.

It appears that it was the consensus of opinion among those interested in accomplishing correlative right protection that there was but one effective remedy, and that it was to limit production to the amount of the reasonable market demands or transportation and storage facilities.

We have seen that prior to the enactment of this measure the correlative rights of some of the surface owners

in certain oil pools in Oklahoma were being invaded, seriously injured, and in some cases, practically wholly destroyed by excessive withdrawals by certain producers, like the plaintiff here, specially equipped to handle their own production. Also, these and others were wasting large quantities of gas and gas energy, thus causing underground waste. The conduct of these producers was the direct cause of untold surface waste of oil, as well as underground waste. The chief offenders were the integrated producers. These made excessive drafts on the common sources of supply of oil, transporting their production through their own pipe lines to their own steel storage tanks for use in their own refineries. (See, also, Order 920, June 5, 1915, R. Vol. II, Pt. 4, pp. 449-450.)

The non-integrated producers, for their protection, in many cases constructed earthen dams across draws and creeks or dug large pits on the surface and operated their wells and stored their production in the earthen tanks thus constructed. Oil so stored, being exposed to the atmosphere, greatly deteriorated in quality because its more volatile constituent elements evaporated into the air; large percentages of it were absorbed into the pores of the soil and when rains came considerable amounts were washed down the streams. That which they had left was of little value. Their estates were being destroyed. Some of the non-integrated producers stored some oil in steel storage, but that type of storage was quite expensive, and, additionally, there was a limit, because of many practical considerations, to the amount which could be so stored.

The conditions which have and do obtain in the Oklahoma City field demonstrate the reasonableness, and, in fact, necessity that production be limited to market demand and that ratable taking be required.

The Oklahoma City pool was discovered in December, 1928. The discovery well is located about two and one-half miles north of the present southern edge of the field. (See map, plaintiff's Exhibit 7, R. Vol. II, part 1, p. 2A.) Said well was drilled to the extreme depth of 6550 feet and there it encountered paying oil production in the Arbuckle lime (Clifton, R. Vol. I, part 2, pp. 253-254).

Subsequent drilling in the pool disclosed that the Arbuckle lime formation covered a considerable area (see map, plaintiff's Exhibit 7, cited above). Within nine months the potentials of the then drilled wells so far exceeded the then existing market demand for oil produced and the storage facilities in the pool that it was necessary that the operators prorate their production in the manner provided in this law. (Collins, R. Vol. I, part 2, pp. 285-286.)

In October, 1929, the Corporation Commission issued its first order concerning proration in said field. (Finding IX, R. Vol. I, part 2, p. 189.).

The field continued to expand and other oil-containing formations were found (Clifton, R. Vol. I, Pt. 2, pp. 253-256), the last and most prolific of which is the Wilcox sand, all about the same level, approximately 6500 feet below the surface. The field extended several miles to the north and west into platted additions to the City of Oklahoma City wherein there were many owners of quite small tracts of

land, and finally it encroached upon the corporate limits thereof. (See said map, plaintiff's Exhibit 7.) Development is still in progress. The town-lot area of the field produces mainly from the prolific Wilcox sand.

The plaintiff entered said field in 1930 after it was placed under proration and while it was in a state of intensive development. Plaintiff took scattered leases all located in the town-lot portion of the field. They cover relatively small tracts of land (Finding III, R. Vol. I, part 2, pp. 179-180), and are surrounded by small leases owned by others. Plaintiff's first production therein was had in September, 1930 (Finding IV, *ibid,* pp. 181-182).

By June, 1931, there were fifty-three separate individual producers of oil in said field (Finding VI, R. Vol. I, part 2, p. 184) owning 339 producing leasehold estates therein. (This latter number is the total of the names of the leases shown in the column headed "Well" on plaintiff's Exhibit 24, R. Vol. II, part 1, pp. 37-68.) Plaintiff's Exhibit 7, referred to above, shows, though dimly in many instances, the locations and boundaries of the 339 separately-owned producing leases.

By June 15, 1931, 746 wells had been drilled (Finding VI, R. Vol. I, part 2, p. 184), and the pool had long since become the largest pool ever discovered in Oklahoma. On said date its wells had a potential capacity of 8,963,679 barrels per day, or, when divided by three, 2,987,993 barrels (Finding VI).

Many of the wells are capable of producing in excess of 50,000 barrels per well per day (see plaintiff's Exhibit

24, R. Vol. II, part 1, pp. 37-68, and particularly pp. 37, 39, 40, 44, 56, 57, 58, 59, 64, 65, 66 and 67 where the potentials of the wells as at June 1, 1931, *are listed* under the column entitled "Potent").

There is a very large amount of gas in solution with the oil in each of the producing horizons, and in some places free gas lies above the oil-saturated portions of the formation. Because of the great depth of the formations, the reservoir pressures were originally 2400 pounds to the square inch. The gas is thus very highly compressed and moves quickly toward any point of reduced pressure. Water lies beneath and around the oil deposits, resulting in a heavy hydrostatic pressure on the oil and gas. There are wells which on wide-open flow produce millions of cubic feet of gas to the barrel of oil, while others have been so completed or are so located on the structures that their gas-oil ratios are low, such as 500 cubic feet of gas to the barrel of oil. (Stalcup, R. Vol. I, Pt. 2, pp. 276-278; Dow, R. *ibid*, p. 262.) Water has appeared in wells in some parts of the field. (McWilliams, R. *ibid* 348.)

There are but few purchasers of oil in said field. (See Finding VI, R. Vol. I, Pt. 2, pp. 184-185.) During the period of one year prior to the hearing below, from July, 1930, to July, 1931, the market demand for oil in the pool ranged from 85,000 to 200,000 barrels per day, the latter amount having been reached for the first time during the last three days of June and the first day of July, 1931 (R. Vol. II, Pt. 2, pp. 90, 110, 129, 168, 209 and 215; Vol. I, Pt. 2, p. 344). Whereas, the potentials of the field, on the ba-

sis of the 4-hour gauge of each well multiplied by six to extend it to a 24-hour basis, increased from 600,000 barrels per day in June, 1930 (R. Vol. II, Pt. 2, p. 90), to 2,800,000 barrels in October, 1930, (R. *ibid* 129), to 5,388,298 barrels in January, 1931 (R. *ibid* 168), and to 7,718,244 barrels the last of June, 1931 (R. Vol. I, Pt. 2, p. 304). The orders of the Commission, from time to time, limited the production from each well to that percentage of its potential capacity which corresponded to the then ratio between the potential of the pool as a whole and the amount of the market demand from the pool. In its Order 5437, February 10, 1931, the Commission adopted a rule to divide by three the potentials of the wells in said field as shown by the 4-hour open-flow of the wells times six (R. Vol. II, Pt. 2, pp. 204-205), the reason for which we shall explain in our discussion of gauges and potentials. The record discloses that many new wells of unexpected large potentials were brought in in July, August and September, 1930 (R. Vol. II, Pt. 2, p. 119). Thereafter, drilling continued, and yet at the time of the trial the extent of the area of the pool had not been determined.

The storage facilities in the field consist of stock tanks for each separate lease, each capable of holding a few hundred barrels, and a comparatively few large storage tanks. At each well there is either a "flow-tank" or a "separator" which receives the oil and gas direct from the wells and in which the gas is separated from the oil, and from which the oil flows to the stock-tanks, where the amount is gauged. However, neither flow-tanks, separators nor stock-tanks are to be counted in estimating the storage facilities which

would be required to take care of production in event the wells were allowed to produce in appreciable excess of the amount of the market demand for oil from the field, because such equipment is essential to handle the production even under the present system of proration.

The only large amount of storage capacity which is definitely shown by the record to exist in the vicinity of the Oklahoma City field consists of twenty-eight 80,000-barrel tanks erected by the Sinclair Oil & Gas Company (Wiggins, R. Vol. I, part 2, p. 273). These have a total capacity of 2,240,000 barrels, but the Sinclair Company owns in said field fifty-four wells with a total potential capacity of 398,548 barrels per day, before being divided by three (R. Vol. II, part 1, p. 13). The plaintiff has an 80,000-barrel tank in the field. On September 25, 1930, 1,333,000 barrels were in storage on leases in the field (R. Vol. II, Pt. 2, p. 119), and on November 3, 1930, there were 3,169,796 in lease storage (R. *ibid* 148). This was no doubt principally in stock-tanks. It was oil which the pipe lines could not take (R. *ibid* 148).

To provide for any substantial amount of production above the amount of the market demand for oil from the pool, if the excess is to be saved from waste on the surface, steel storage tanks would have to be erected. The best steel storage costs 25 cents per barrel of oil stored therein (R. Vol. I, Pt. 2, pp. 273-274). Modern steel storage tanks are usually capable of holding either 55,000 barrels or 80,000 barrels each. Tank farms cannot be located in the heart of a field because the tanks must be positioned considerable

distances apart, usually 400 feet from shell to shell, and each must be surrounded with an earthen dike so that if any one of them is fired by lightning and its oil-content burns, none of the o t h e r s may be greatly endangered. (Bureau of Mines, Bulletin 155, Tech. Pap. 41, p. 3.)

In May, 1931, the fifty-three producers in the Oklahoma City field were classified as follows:

(a) Thirty-six producers having no pipe lines or refineries and who were dependent upon the pipe lines of others for an outlet for their oil. These had in the aggregate 596 wells, with a potential capacity of 7,192,609 barrels per day;

(b) Nine companies, owning ninety-six wells with a potential capacity of 737,739 barrels per day, who owned their own pipe lines and refineries; and,

(c) Eight companies with fifty-four wells having a potential capacity of 133,629 barrels per day, who owned pipe lines and refineries, but whose wells were so located as that they had to depend to a certain extent upon other lines to handle their production (R. Vol. II, part 1, pp. 12-14; Collins, Vol. I, part 2, p. 295).*

Outside conditions have a material bearing on the demand for oil in this field and the practicability of storing production therein. We shall state some of these.

The great Seminole pool was discovered in 1925, at the very cross roads of the major trunk pipe lines running north and south across Oklahoma (Collins, R. Vol. I, Pt. 2, 296-297), two or three years before the discovery of the Oklahoma City pool. It lies about 65 miles east and somewhat

* 77% of the producers in the Greater Seminole area are non-integrated (Finding VI, R. I, Pt. 2, p. 183).

south of the Oklahoma City pool. More than one year before the discovery of the Oklahoma City pool, and on August 1, 1927, the then discovered pools in the Seminole area were placed under proration by orders of the Corporation Commission (Finding IX, R. Vol. I, part 2, p. 189). Their potentials greatly exceeded the market demands for oil and the storage and transportation facilities therein, although there was then no pool at Oklahoma City to interfere with their market outlets.

Before the Seminole pool was discovered there were already a large number of other producing areas in the state. The Commission's Order 5189, dated June 30, 1930, states that there were in the state at that date 60,000 older and smaller wells producing an average of 4.18 barrels per well per day (R. Vol. II, part 2, pp. 91-92). These, called stripper wells, had their long-established market outlets.

Exploration in the Greater Seminole area had opened up other new pools therein before Oklahoma City came on, and at the time of the trial below, the last days of June, 1931, there were eight or more large pools in the Greater Seminole area with 2441 wells; as each one of them was brought in, it was placed under proration by orders of the Commission (Finding VI, R. Vol. I, part 2, p. 183).

In December, 1928, there were also many large oil pools in other oil-producing states and particularly in Texas and California, not to mention the old settled pools in those and many other states. The record does not show the conditions in 1928, but in October, 1930, the Commission found that the available potential supply of oil in the

various pools in the United States amounted to about 10,000,000 barrels per day, whereas, at that time, the total demand for oil was for but 2,800,000 barrels per day, between one-third and one-fourth of the potentials; and already tremendous quantities of oil, 685,000,000 barrels, had been placed in above-ground storage (R. Vol. II, part 2, p. 126). The witness Wiggins testified that over 500,000,000 barrels are in storage in various parts of the United States (R. Vol. I, Pt. 2, p. 274). The new large pools had not, as, in the nature of things, they could not have been, foreseen by crude oil purchasers; otherwise, it is reasonably certain that no such amounts of oil would have been stored above ground. It is obvious that it is unwise to increase already excessive above-ground storage, attended as it necessarily is by some degree of deterioration from year to year and frozen investments in its cost (see Bureau of Mines, Bulletins 155 and 200), at times when it is clear that there is an abundance of fresh oil available at the wells for a considerable period of time in the future. The amount of oil bought in Oklahoma from all of its pools amounts to around only 500,000 barrels per day (R. Vol. II, Pt. 2, p. 127).

Likewise, it is obviously unwise in these circumstances, and it would be most unreasonable to expect individual non-integrated oil producers in the Oklahoma City field or elsewhere to store any of their own production in excess of amounts they can market, in above-ground tanks in order to save their properties from drainage by the integrated companies like the plaintiff. They might as well permit their estates to be destroyed by drainage by others as to

destroy them themselves by costly storage of deteriorating and unsalable oil. Effective co-equal right protection cannot be accomplished in that way. Furthermore, it assumes a financial ability on the part of every one of them to provide the required storage. Many of them cannot possibly do so, for they have not the means and could not obtain it. Many of them, though entirely willing to do so, cannot even contribute to the funds required to maintain proration. (McLennon, R. Vol. I, part 2, p. 304.) The best and cheapest place to hold oil in storage is in the natural reservoirs where it originally accumulated and will not waste.

The transportation facilities which enter the field are these, namely, pipe lines, one belonging to each of ten companies, having a total transporting capacity of 316,000 barrels per day, and loading racks, one belonging to each of twelve concerns, on the railroads which pass through or near the field, having a total capacity of 123,000 barrels per day (plaintiff's Exhibit 17, R. Vol. II, part 1, pp. 11-12; Collins, R. Vol. I, part 2, p. 295). These capacities total 439,000 barrels per day, so that if these were made available for transportation of that amount, regulation would still be necessary for the protection of correlative rights. The Prairie Oil & Gas Company, owner of a very small amount of production in said field, and whose pipe line capacity ranges from 45,000 to 50,000 barrels per day, had discontinued purchasing oil prior to the trial in June, 1931 (Collins, R. Vol. I, part 2, p. 297).

Most of these pipe lines connect with so-called "trunk lines" of their owners, built long before the field was dis-

covered, which pass north and south through the state at points considerably east of the Oklahoma City field, and can take only such amounts of oil as can be received into the trunk lines with which they connect, because of oil in the trunk lines which has been taken from other fields (Collins, *ibid* 297). Hence, these pipe line facilities entering the Oklahoma City field are not at all necessarily as large as the actual capacities of the lines themselves would indicate, even if their owners were willing to buy oil equal thereto in amount.

Each of the fifty-three leaseholders in the pool is the possessor of a right to reduce to possession a portion of the oil contained in the common pool. Each one regards his own right to be as sacred and certain as that of any of the others, although it does seem that the plaintiff regards its right as superior to that of others.

When we contemplate the situation in which the thirty-six non-integrated companies above mentioned would find themselves if production substantially above the market demand were permitted for even a short period of time, or only slightly above for a long period of time, we readily perceive that in practice it would be but a short time until these thirty-six proprietors, being unable longer properly to store their excess of production, and some of them not being able to do so at all, correlative rights would be destroyed, and some of said producers, so far as their Oklahoma City field holdings were concerned, would be literally wiped out. It may be taken for granted that the nine companies which own their own pipe lines and refineries would

transport as much as possible of the full production of their own wells. The non-integrated producers would be seriously injured or destroyed either by drainage or, by doing as producers did in Cushing and Healdton, that is, by running their oil to earthen storage where it would deteriorate and waste, and that, if any, which they would be able finally to dispose of would bring practically nothing.

It is perfectly apparent that if, in this pool, correlative rights are to be protected, some limitation on production must be imposed and ratable taking must be required. The question is: What shall the limitation be? Shall it be 25 per cent of the oil-producing potentials of the wells, or a total of 2,225,000 barrels? Of such amounts, if the purchasing companies took ratably, only 200,000 barrels (the amount demanded July 1, 1931) would be purchased and/or taken from the fifty-three producers of the field, and this would leave 2,025,000 to be stored at least the first day. Such a thing is unthinkable. Shall it be 10 per cent or 890,000 barrels per day, thus leaving 690,000 barrels to be stored each day? A large amount would have to be stored from day to day until the total amount in storage would be so absurdly large as to be as equally unthinkable as would be the situation if the allowable production were placed at 25 per cent of potential. Beyond question, it is more reasonable and more practicable for the production to be limited to the amount which the market will absorb. *If it is to be larger than that, then by what test shall it be determined? We know of none.*

Ratable taking based on market demand injures no producer. No owner is thereby deprived of any part of his fair share of the common supply of oil. In the absence of ratable taking, no one producer in said field will sit supinely by and see his own right to draw upon the store of oil destroyed or even seriously injured. It is a question as to whether the state will allow the battle of destruction of rights and property values to rage and an irreplaceable natural resource to be wasted, and fresh-water streams and farm lands to be ruined, or whether it will extend its protecting hand to maintain order and to regulate conduct in such manner as to protect rights. In the absence of the extension of a protecting hand, it is inevitable that rights and property values will be destroyed and inestimable waste committed. In the absence of regulation of a type comparable to that prescribed by the law and orders involved in this action, the integrated producer like the plaintiff will either appropriate a vastly larger proportion of the common fund than his fair share thereof, or, compel the non-integrated producers to store their production, and they will place much of it in earthen storage as was actually done in the Glenn pool, the Cushing pool and the Healdton pool. Meanwhile, inestimable underground waste takes place to the injury of all concerned.

If, as was the case in the Cushing field in 1914, as shown by the old orders referred to, when the potentials of all the wells therein amounted to no more than 300,000 barrels per day, and the market demand amounted to as much as 200,000 barrels per day, thus leaving an excess of

potential over demand amounting to only 100,000 barrels per day, oil was stored in earthen and steel tankage "and many thousand barrels" were "dammed up in the creeks," and "10,000,000 barrels of surplus production" was stored in said field, and many of the producers were "carried along in a whirl of production as helpless as a child in mid-stream" and could not prevent the inevitable results and if in the Healdton field in 1914, with its potential production of only 70,000 barrels per day, pipe line facilities of 21,000 barrels per day and market demand for only 15,000 barrels per day, 600,000 barrels of oil was at one time in earthen storage and heavy rains and floods carried much of it down the streams and injured crops and vegetation and stock-water on farm lands; and if in those fields the premature blowing of gas from the oil sands prevented their rock pressures from being conserved for the continued expulsion of oil and increasing the ultimate production thereof—if those results flowed from a failure to limit production to market demand and to require ratable taking in fields with no greater potentials than those two fields had, then what, may be ask, might be expected in the form of waste and destruction of correlative rights in the Oklahoma City field with its gigantic potential of nearly 9,000,000 barrels per day, or when divided by three, of nearly 3,000,000 barrels per day, and a market demand which at its highest is as low as 200,000 barrels per day, if production therein is not limited to market demand and ratable taking is not required? There is a greater reason for such a limitation and requirement in the case of a field with such an extremely

large potential and comparatively low market demand than for a like regulation of a field with a relatively low potential and relatively high market demand.

PLAINTIFF'S ABILITY TO PRODUCE WITHOUT WASTE.

Although it may be true that plaintiff individually commits no waste nor threatens to do so, nevertheless the state has the power and the statute is framed in pursuance of a policy to regulate pools or common sources of supply as units in order better to insure against waste by anyone, and to require plaintiff to conform to such reasonable regulation.

The plaintiff says and the court found (Finding V, R. Vol. I, Pt. 2, p. 182) that it does not pour any oil on the ground or otherwise waste any thereof on the surface, and that it makes a beneficial use of what it produces. Plaintiff contends that it is only against such physical waste that the state may adopt a police regulation. (Plaintiff's brief, p. 38.)

This statute not only prohibits waste by an individual but it also looks to the pool or "common source of supply" as a unit for the application of preventive measures against waste. By section 4 the legislature enjoins upon the Commission the duty of examining each such "common source of supply" and if conditions are there found which inevitably lead to waste by or in the pool as a whole then the pool as such is to be regulated and there is to be no selection of individual producers to bear the brunt to the ex-

clusion of others but all are to share the inconvenience of the necessary curtailment proportionately. Thus when a pool such as Oklahoma City has a potential production of 2,500,000 barrels per day (the gauge divided by three; see, Finding XIV, R. Vol. I, Pt. 2, pp. 193-194) and the marketing facilities or market demands aggregate only 200,000 barrels or less per day, it becomes apparent that it is inevitable and unavoidable that the "full production" from that common s o u r c e of supply cannot be had without waste. So, the mandate of the statute then is that the pool as a whole shall be curtailed and without regard to which of the producers therein may have better or more ample facilities than the others. Each and all are required to submit to a proportional limitation in order that each and all shall be protected in his co-equal right to produce while waste is thus being prevented.

This method accomplishes the following:

(a) Prevents waste from the pool by any one in the pool.

(b) Secures to each operator his co-equal right to produce from the pool.

(c) Prevents a disproportionate or wasteful exercise of the right to the detriment of the others.

To adopt the plaintiff's contention that each operator in the pool must be allowed to produce from his wells all of the oil that he individually can produce without waste and which he can put to a beneficial use, would be the adoption of a standard for proration which would defeat rather than promote the ends above enumerated.

Neither such standard nor an apportioning of the right to produce according to capital invested would prevent waste where the potential production of the pool exceeded the sum of all the marketing facilities of all the operators therein. It would not even secure to each and every operator the right to produce from the pool. It would not prevent a disproportionate use of the right to take but would promote it. Thus such a standard would accomplish none of the purposes which the Oklahoma Legislature had in mind.

Plaintiff's contention, if sound, would award to each of the several individual intergreted producers in the Oklahoma City pool, including the plaintiff, the same right which plaintiff asserts. This would attribute to each of the integrated producers an undue proportionate part of the common fund of oil beneath the lands of themselves and all of the other proprietors therein. To adopt plaintiff's view is to say that there is no such thing as a co-equal right on the part of each proprietor to reduce to possession a due proportionate part of the oil in the common supply, or that, if it exists, its exercise cannot be regulated by law. Also by the disproportionate withdrawals which would be made, underground waste would result and thereby additional serious injury to correlative rights would occur.

This court in the *Ohio Oil Company, Lindsley, West* and *Walls* cases did not hold that the extent and limits of the legislative power to protect co-equal rights were reached and exhausted by a prohibition against any operator wasting oil or gas on the surface or putting the produced oil or gas to a non-beneficial use. This court has not held that

a legislature may not restrict a producer to less than the natural flow of his wells in order to protect co-equal rights. In fact its holding is that it can do so. Said cases expressly hold that the protection of co-equal rights can be afforded by prohibiting production in *excessive* amounts from the common fund of oil and gas if to produce excessively will injure others having a like and equal right to make draughts upon the common fund.

In the *West* case this court discussing its decision in the *Ohio Oil Company* case, said:

> "Against the (Indiana) statute was urged the rights of property assured by the 14th Amendment of the Constitution of the United States. The case is a valuable one and clearly announces the right of an owner to the soil beneath it, and the relation of his rights to all other owners of the surface of the soil. The right of taking the gas, it was said, was common to all owners of the surface, and because of such a common right in all land-owners, *an unlimited use (against a wasteful use the statute was directed) by any it was competent for the state to prohibit.*" (Italics ours.)

Therein the court also held that it was because of the purpose of the Indiana statute "to secure to the common owners of the gas a proportionate acquisition of it—a reduction to possession and property," that it was sustained.

In the *Walls* case it is expressed in this language:

> "It was decided, however, that before that event occurs, indeed, in prevention of it, the state may interpose its power to prevent a waste or *disproportionate* use of either oil or gas by a particular owner in

order to conserve the equal right of other owners and advance the public interest."

The fact that the specific provision of the Indiana statute was that oil or gas should not be permitted to escape into the open air for longer than two days, does not mean that the decision in the *Ohio Oil Company* case is to be interpreted as meaning that a legislature could do no more than to forbid surface waste of what is produced. The property right pointed out and defined by the court was a right to reduce a portion of the common fund to possession and thus acquire property in the amount produced. The court in the *Ohio Oil Company* case said that "the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of others * * *." The court then added the statement "or by waste by one or more to the annihilation of the rights of the remainder."

The New York statute involved in the *Lindsley* case prohibited production of the mineral waters by artificial means (whenever the production was for a certain named purpose) but it did not prohibit the natural flow of the wells. The principle of the *Ohio Oil Company* case was applied to sustain said statute, but the fact that the statute went no further than to prohibit production by artificial means and hence to permit the natural flow of the wells did not lead this court to qualify to the least extent its announcement of the controlling principle. In fact the court stated that "were the question an open one we still should solve it the same way."

So it clearly appears that the controlling principle is by no means qualified to the extent the plaintiff in its argument by necessary implication asserts it to be.

Plaintiff's contention denies the legislative power thus conclusively shown to exist to select a reasonable standard applicable to all alike for correlative right protection. It entirely ignores the fact that correlative rights can be injured far more seriously by disproportionate extractions from the common supply of oil than by waste committed upon the surface.

PLAINTIFF'S CAPITAL INVESTMENT THEORY.

This theory is presented on pages 63 to 69 of plaintiff's brief. If adopted, it would substitute for proration, measured by the potential production of the wells of the various land owners in a common source of supply, a criterion consisting wholly of investments extraneous to the pool itself.

If we should assume that said theory is itself a reasonable one, then whether it should be adopted is distinctly a question addressing itself to the discretion of the legislature since it goes to the wisdom and not the power of the law-makers.

What we have said under the heading "The Plaintiff's Ability to Produce Without Waste" furnishes as well a complete answer to counsel's argument in support of this theory.

Proration, instead of dealing with those who are engaged in the business of refining and marketing the refined

oil, regulates and protects the rights of the owners of land in the pool from which the oil is produced, rights appertaining to the ownership of real property. The regulation is ultimately but a regulation of real property and operates to preserve and protect such rights *(Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 212, 44 L. ed. 729-740). It operates upon *land owners as producers,* and not as refiners and marketers of the oil they may produce.

Counsel's contention with reference to capital investments as a suggested standard of proration reveals the plaintiff's true position to be that, since it has its own wells connected to its own pipe lines and can transport its own oil to its own refinery, it cannot be compelled in times of over-production to submit to the statutory requirement of proportional taking to prevent waste and to protect the correlative rights of all the producers in the field, the majority of whom do not have pipe lines or refineries or other outlets of their own. This suggestion challenges the power of the State of Oklahoma through its laws to protect the public welfare against the waste of an irreplaceable natural resource, a power clearly embodied as an integral part of the police power of the state, and the suggestion, if given effect, would destroy the ancient maxim of the common law, *"Sic utere tuo ut alienum non laedas,"* that everyone shall so use his property as not to injure his neighbors. This maxim forms a fundamental part of the statutory enactment in question, for one of its principal purposes is to protect the correlative rights of *the producers as such* in each common source of supply, a

purpose clearly designed to prevent the powerful integrated or the more fortunately situated producers from injuring or destroying the rights and the property of their less fortunately situated neighbors, the non-integrated producers, by disproportional takings, resulting in drainage, underground waste and other forms of discrimination. In short, to paraphrase some language in the *Ohio Oil Company* case, the Oklahoma law recognizes and protects private property rights, and prevents them from being taken by one of the common owners without regard to the enjoyment of the others.

THE VALIDITY OF SECTION 2 OF THE ACT IS NOT INVOLVED IN THIS SUIT.

Section 7955, C. O. S. 1921 (Sec. 2 of Original Act), is a separate and independent statute or section.

If this section be dropped as invalid, the remaining sections are fully operative as law.

The Corporation Commission has never attempted to fix the value of crude oil under this section, or regulate the production of crude oil with reference thereto.

No attempt has been made to enforce the provisions of this section against appellant or other producers of oil, and the validity thereof is not involved in this suit.

It is not necessary to resort to this section as an aid to the construction of the other provisions of the act.

(Under the heading "Price Fixing" we discuss plaintiff's contention that by the orders in question the Commission has attempted to control the price of oil.)

An examination of the orders of the Commission in force at the time of the trial, or any that preceded them in the current series, will not disclose any finding or order made under section 2 fixing the value of crude oil at the well or elsewhere, or any regulation made with reference thereto.

The record discloses that only one application was ever made to the Commission to determine such value. Upon that occasion, by Order 1022 (R. Vol. II, Pt. 3, p. 264), entered February 18, 1916, the application was dismissed, because the Commission was "of the opinion that the fixing of a price of crude oil under section 2 of this act is absolutely impossible and impracticable."

The first order of the Commission in the administration of the law was No. 920, issued June 5, 1915. (R. Vol. II, Pt. 4, p. 440). In that order the Commission stated that "section 2 is not involved in the complaint" (R. *ibid* 445), and it discussed the validity of sections 3 and 4 in the light of the decisions of this court, hereinbefore reviewed, and having reached the conclusion that such sections of the statute were valid, made its order limiting production in the Healdton field to the market demand, and limiting each producer to that proportion of the capacity of his wells, which the market demand bore to the full production of the pool. The Commission expressly stated that it predicated "its order upon the authority vested in the Commission by sections 1, 3, 4 and 5 of the law known as the Conservation Act, and particularly that part regulating the equitable taking of oil among the operators" *(ibid,* p. 454).

In Finding of Fact X (R. Vol. I, Pt. 2, p. 189), concurred in by all the judges constituting the court (R. Vol. I, Pt. 2, p. 212), it is recited that:

> "The said orders of the Corporation Commission which are attacked in this suit, were made and entered under and pursuant to the provisions of Secs. 1, 3, 4, 5 and 6 of the Oklahoma Oil Conservation Act, approved February 11, 1915."

That was repeated in the Conclusions of Law (7) (R. Vol. I, Pt. 2, p. 214).

The court also found that "The Commission has never entered any order under section 2 of said act." (Finding XXVIII, R. Vol. I, Pt. 2, pp. 209, 210.)

The District Court held in the opinion by Circuit Judges Cotteral and Phillips (R. Vol. I, Pt. 2, p. 224) that sections 1, 3, 4, 5, 6 and 7 of the act provide a complete scheme for the enforcement, through rules and regulations promulgated by the Corporation Commission, of the general rules provided in sections 3 and 4 for the prevention of waste and for the protection of the co-equal rights of the several owners of land over a single pool of oil and gas to take from a common source of supply, and may be severed from the remaining portions of the act.

The State Supreme Court in effect held in the *Julian* case (145 Okl. 237, 292 Pac. 840) that section 2 is an independent and separable provision, and the remainder of the original act is complete and enforceable without reference thereto. The court in that case sustained the validity of sections 7954, 7956, 7957 and 7959, C. O. S. 1921 (Secs.

1, 3, 4 and 6 of the original act) as a valid exercise of the legislative police power, and held that the Corporation Commission had jurisdiction to promulgate rules and regulations for the enforcement thereof. In concluding the opinion, the court said:

> "Section 7955, C. O. S. 1921, which is section 2 of the Oil Conservation Law of 1915 (Laws, 1915, ch. 25), is not involved in this action, and it is not to be assumed that if the Corporation Commission were attempting to fix the market value of oil under that section, we would sustain same."

In *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 395, this court said:

> *"It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power."*

See also:

Connally v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565;

Field v. *Clark*, 143 U. S. 649;

Pollack v. *Farmers L. & T. Co.*, 158 U. S. 601, 635;

Little Rock & Ft. Smith Ry. v. *Northern*, 120 U. S. 97;

Allen v. *Louisiana*, 103 U. S. 80;

Florida Cent. R. R. Co. v. *Schulte*, 103 U. S. 118.

Courts sometimes have difficulty in determining whether a given act would have been passed with the independent invalid portion left out, that is, whether it was the legislative intent that the entire act should stand or fall together. There is no such difficulty here. The legislature declared in section 10 of the original act,

> "that the invalidity of any section, sub-division, clause or sentence of this act shall not in any manner affect the validity of the remaining portion thereof."

This provision overcomes any presumption that the legislature intended that the act be effective as an entirety, and creates the opposite one of separability, "and this presumption" (of separability) "must be overcome by considerations which make *evident* the inseparability of its provisions or the *clear probability* that the invalid part being eliminated, the legislature would not have been satisfied with what remains." *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242. There are no reasonable considerations that can be indulged in this case that make evident or establish the clear probability that the legislature would not have been satisfied to pass the act with section 2 eliminated. Even in the absence of section 10 (to employ the language of this court in *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 617), "the independence seems to us obvious on reading the statute."

The section claimed to be invalid may be entirely omitted and passed over in reading the act, and it will readily be observed that the remainder is fully operative as a law. That section operates in a field entirely distinct from the remainder of the act, and is clearly designed to accomplish

a different purpose, and employs a different means to the accomplishment of its ends.

That section *prohibits* the production of any oil at all when there is no demand for its purchase at its value at the well, as ascertained on the basis prescribed in the section. Whereas section 7957 (Sec. 4 of the original act) *permits* the production of oil, but limits it to the amount that may be produced without waste "as herein defined," that is, as defined in section 7956 (Sec. 3), and provides for the proration of the oil that may be so produced.

The respective fields in which section 2, and sections 1, 3 and 4 operate are separate and distinct. Section 2 operates exclusively in the field of values or prices, and prohibits the production of oil from a well when the prescribed value thereat is not forthcoming. That section deals with the question of values, without any regard whatever to the question of protection of correlative rights, by the prevention of waste. The other sections in terms, and as they have been construed and administered by the Commission for over fifteen years, and as they have been construed by the Supreme Court of the state in the *Julian* case, occupy the other and distinct field of waste prevention, and protection of correlative rights of those having the privilege to produce from a common source of supply. Those sections deal with those matters without any reference whatever to the question of the value or price of oil. Under section 3, the Commission has the authority to protect all collective owners against acts that would result in underground waste, by regulating the method of drilling, casing and equipping

wells. As heretofore stated, it has exercised that authority for years. (Order 1299, July 16, 1917, referred to in Order 5437, R. Vol. II, Pt. 2, p. 195.) These regulations prohibit certain acts and require others to be performed in a prescribed way. Such regulations act directly on the individual operator. They have nothing to do with the value of oil under the provisions of section 2. Reasonable regulations pertaining to the method of drilling, casing and equipping wells for the purpose of preventing underground waste made by the Commission under the authority of section 3 are valid. Certainly, the validity of section 3 in so far as it confers such authority, in no sense depends upon the validity of section 2. Its interpretation is in nowise aided by any part of section 2.

We have shown the existence at times of certain evils growing out of the unrestricted production of oil from a common source of supply which were known to the general public and the legislature at the time of the passage of this act, and which the act was designed to remedy. Certain results, especially harmful and in some instances destructive to the rights of some of those having the privilege to produce from a common source of supply, always attended the production of oil from such source in excess of the quantity that could be marketed, denominated in section 3, defining waste, as "production in excess of transportation or marketing facilities or reasonable market demands." We have shown other results, injurious to the rights of producers, as a consequence of full production, known at the time of the enactment of the law, and denominated therein as "underground waste."

These consequences of excessive production occur without regard to the value or price of oil. In no conceivable way could a regulation prescribing the value of oil, afford a remedy therefor. The only effective remedy that has been conceived to prevent such injuries to correlative rights is limitation on the total amount of oil produced from the common source of supply. So the legislature, by section 4, provided for such limitation, "whenever the full production from any common source of supply of crude oil or petroleum in this state can only be had under conditions constituting waste as herein defined." Among the conditions constituting waste as so defined, are the types of "underground waste" heretofore described, and waste incident to production in excess of the quantity or amount that could be marketed. The limitation in the case of underground waste, would be to the amount that would best utilize the reservoir energy to secure the maximum ultimate recovery. Obviously, the value or price of oil could have nothing to do with a limitation for that purpose. In the case of production in excess of transportation and marketing facilities or of reasonable market demands, the limitation would be to the amount that could be transported, by the available facilities or the amount that could be marketed, whichever happened at the time to be the lower. Obviously, it is not necessary in limiting production for that purpose, to take into consideration the element of value. In this field the statute is dealing with quantities, numbers of barrels and not price or value. Section 4 then provides that such limitation of production from the entire source of supply should be accomplished by limiting the production of each

person having the privilege to produce from the common source, to that proportion of the full production of his wells which the amount of production to which the entire pool is limited bears to the full production thereof. Clearly, the value or price of oil is not a factor in the apportionment. It is clear that the legislative intent and purpose in the enactment of sections 1, 3 and 4, in view of the evils to be remedied, was to protect the correlative rights of all the owners, by regulations to secure to each his fair and equitable share of the oil that could be produced from the common reservoir during the period that a limitation on production was necessary to prevent the wastes and consequent injury to correlative rights incident to full production.

It is apparent that while section 2 deals exclusively with values of oil that the remaining provisions of the act deal exclusively with quantities.

In view of conditions existing at and before the enactment of the law, the provisions of sections 1, 3 and 4 were wholesome and necessary police regulations. Those provisions can be interpreted and administered without the aid of or any reference whatever to section 2.

It is asserted that section 2 is the keystone of the legislative arch. We disagree. We think that the provisions of section 4 for proportional production is the keystone. In any event the main purpose of this suit is to strike down the provision for proportional production. If it is eliminated, the principal purpose sought to be accomplished by the act, and of the Commission in its administra-

tion; *viz.*, the protection of the rights of all the collective owners, will be defeated.

It is asserted that the whole purpose of the act is price-fixing. That sections 1, 3 and 4 are a mere mask for, or adjuncts to the price-fixing provisions of section 2. It appears to us that the provisions of section 2 stand out rather clearly, and are in no way disguised by the other sections. We submit that if the sole intent of the legislature was to regulate prices by fixing values, that purpose is expressed by section 2, and its enforcement cannot possibly be in anywise aided by sections 1, 3, 4 and 5.

The elimination of section 2 (7955, C. O. S. 1921) from the act does not render the remaining part too uncertain and indefinite to confer upon the Commission the power and authority it exercises through its rules and regulations.

—*C. C. Julian Oil & Royalties Co.* v. *Capshaw,* 145 Okl. 247, 292 Pac. 841;

Quinton Relief Oil & Gas Co. v. *Corporation Commission,* 101 Okl. 164, 224 Pac. 156;

Levy Leasing Co. v. *Siegel,* 258 U. S. 242;

Miller v. *Strahl,* 239 U. S. 426;

Omaechevorria v. *Idaho,* 246 U. S. 343;

Plymouth Coal Co. v. *Pennsylvania,* 232 U. S. 531.

Those familiar with the oil production business, and conditions under which it is conducted, and desirous of observing the law have little difficulty in determining its meaning. *Omaechevorria* v. *Idaho,* 264 U. S. 343, 348.

The only terms employed in section 3, necessary to be considered in connection with this particular discussion, are "underground waste" and "waste incident to the production of oil in excess of transportation or marketing facilities, or reasonable market demands."

We have heretofore stated the meaning of "underground waste," as well understood among producers of oil, as being oil wasted underground, that is, oil left in the natural reservoir unrecovered when the wells can no longer be profitably operated and are finally abandoned, but which could have been recovered by proper operations (Arnold, Vol. I, Pt. 2, pp. 326, 328). It occurs whenever the operators or producers so carelessly or negligently or inefficiently complete and/or operate their oil wells that they leave in the reservoirs oil which might and could have been recovered if they had not been so careless or negligent or inefficient. The chief causes of its occurrence are *(a)* the waste or improper utilization of the gas energy naturally stored in the reservoir containing the oil, and *(b)* by preventable water-encroachment or intrusion (McWilliams, R. Vol. I, Pt. 2, p. 340; Stalcup, *ibid,* p. 360). We have heretofore detailed how such waste is caused, among others, by too rapid or disproportional removal of the oil and gas, which is prevented by limitation of production.

The clause "waste *incident to* the production of crude oil or petroleum in excess of transportation or marketing facilities, or reasonable market demands," as used in section 3, is simply a legislative recognition and declaration that certain wastes, of various types heretofore developed in this brief, had resulted and would necessarily result, as

an incident to the production of such excess amount of oil. Such wastes as do so occur, result in injury to and impairment of the rights of some persons having the privilege to produce from a common source of supply. The inclusion of this clause in section 3, defining waste, subjected such excessive production to regulation by the provisions of section 4 under the general terms "conditions constituting waste" as employed in that section.

These terms are readily understood, and have a definite meaning which is neither enlarged, limited, nor in anywise affected by considerations of price or value. We agree with counsel (plaintiff's brief, p. 51) that "demand" has to do with "quantity," and not price. Clearly, "market demand" is not synonymous with "market price." "Market demand" means the quantity for which there is a demand in the market. "Market price" is the equivalent yielded in money for the commodity dealt in. The word "reasonable" is frequently employed as a qualifying term in legislation, and other legal phraseology. As applied to "market demand," it has the same significance as when applied to "market price." In the first it qualifies "demand"; in the other "price."

It is the universal rule of statutory construction that if a law is susceptible of two interpretations, one of which would render it valid and the other invalid, the courts will adopt the one which sustains its validity. If it should be thought that under the construction contended for by counsel, the entire act is rendered invalid, we respectfully submit that that interpretation should be rejected, and the

uniform interpretation by the officers charged with its administration for more than fifteen years and of the Supreme Court of the State of Oklahoma and of the District Court in this case, should be adopted.

SECTION 3 (SEC. 7956, C. O. S. 1921) IS NOT FOR THE PURPOSE, NOR DOES IT HAVE THE NECESSARY EFFECT, OF AUTHORIZING AN AGENCY OF THE STATE TO CONTROL PRICES FOR THE BENEFIT OF ANY CLASS.

In view of what has been said in connection with other propositions relative to the evident purpose of sections 1, 3 and 4 of the act, it should be unnecessary to say more at this place.

Three of the elements (there may be others) of a market are supply, demand and price. The generally accepted theory is that the first two have influence on the third. It is argued that the provisions of the act other than section 2, give the Commission control of supply and demand, hence it vests them with control of price. *The act does not confer such authority with reference to either demand or supply.* Under the power conferred by section 6 to determine any questions relating to the enforcement of the act, the Commission has power *to determine the question of fact* of the reasonable market demand from a given source of supply, and the full, or potential production thereof, and of the several wells therein.

Having determined those facts, the statute prescribes the percentage of the potential supply that shall be pro-

duced by each well to meet the current demand. It has not power to create demand, or increase or decrease it. The demand is created by the buyers or consumers, and its amount is governed by them. Any error as to the findings of the Commission is subject to immediate judicial review (see appellant's brief, p. 164) by appeal to the Supreme Court by any person interested.

The supply of a commodity in so far as it is an element in determining market price is not limited to the amount that is brought to market each day, especially where, as under the provisions of this act, all that the buyers wish to take that day is offered. The supply of wheat that influences price is not solely the amount in the elevators and that is threshed each day, as long as there is sufficient available for immediate consumption, but the amount of the probable yield of the current crop is an important factor. Statistics as to the condition of the major crops are gathered by the government, and from time to time forecasts of the probable yield are published. These forecasts, as well as the amount in the granaries and warehouses, affect prices. Petroleum engineers can estimate the probable ultimate recovery from the developed area of oil fields, after drilling has revealed the thickness and porosity of sands and other factors. This developed potential supply of oil, while yet stored in the ground, affects prices as well as that produced and stored aboveground. See *Economics of the Crude Oil Potential in the United States,* by Joseph E. Pogue, Petroleum Development & Technology, 1931 (Petroleum Division, American Institute of Mining & Metallurgical Engineers), page 633. As long as the production each

day is sufficient to supply all market demands at the time, it is not apparent that limitation of production to that amount is a material factor in price structure. That was Mr. Pogue's conclusion.

The actual administration of this act did not have the effect of preventing a steady decline in prices. That and the entire question of "price-fixing" will be fully developed under a subsequent head of this brief.

PRICE FIXING.

The Commission has not attempted directly or indirectly to fix or control prices.

The regulations of the Commission were not made pursuant to provisions of Section 2 of the Act. (Finding XXVIII, R. Vol. I, Pt. 2, pp. 209, 210.) They were issued pursuant to Sections 1, 3, 4, 5 and 6. (Finding X, *ibid* 189.)

In Finding XXVIII, the trial court by two of its judges, found, among other things, the following:

> "The court finds that none of the orders of the Commission have been made and entered for the purpose of fixing or maintaining the price of crude oil, or that the orders have had that effect."

Therein, the court also found:

> "There was no evidence introduced at the trial of this cause showing or tending to show that the orders of the Commission were intended to fix or control the price of crude oil."

Is the effect, if any, of the orders, rules and regula-

tions of the Commission, on the price of crude oil, an incidental one or is it direct and purposed?

We have already shown (see discussion under headings, "The Correlation of the Several Provisions of the Oklahoma Oil Proration Law and the Conditions Which Invoked Their Enactment," and "The Particular Regulations Prescribed by the Act in Question Bear a Reasonable Relation to the Prevention of Waste and the Protection of the Correlative Rights of the Land Proprietors in a Common Source of Supply") that in order to protect correlative rights in an oil pool where the potential production exceeds demands, it is not only reasonable, but necessary, to limit the production in the pool to the amount of the reasonable market demand and/or transportation and marketing facilities. We believe we there demonstrated that if the allowed production is in excess of said demand and facilities, then waste will result and co-equal rights will be injured and, if the allowables are substantially excessive for a short time or slightly excessive for a long time, such rights may be entirely wiped out; that the integrated producers, like plaintiff, will be greatly favored and, in fact, if the percentage is considerably above that which the market will absorb, the pool will be practically turned over to them and the non-integrated producers excluded.

The existence of this *paramount and controlling purpose* for such limitation of production and *the necessity* for said particular limitation, in order to gain the end of correlative right protection, completely negatives the idea of the existence of a purpose to fix or maintain prices; and from this it necessarily follows that if an effect thereof is

to stabilize the price of oil, it is merely an incidental effect. It is not different in principle from other incidental effects of police regulations, such as their effect on the degree of success with which a particular business may be conducted, as in the *Ohio Oil Company,* the *Lindsley* and the *Walls* cases, or the effect upon the value of property, as in zoning regulations. In zoning cases, property values are affected, some are lowered and some raised. Pure food laws operate to take adulterated foods out of competition with pure foods. The abatement of nuisances affects values and prices. To say that such incidental results destroy the validity of police regulations is to say that the police power itself does not exist.

In 1927, when the first of the present series of orders was made, the price of oil in Oklahoma was more than $2.00 per barrel and it gradually declined until, in June, 1931, it was 35c per barrel (Finding XXVIII, *supra).* The decline was gradual. For example, it declined from $1.01 per barrel in October, 1930, to 67c in December, 1930, to 63c in March, 1931, and to 35c in June, 1931 (Leverton, R. Vol. I, Pt. 2, pp. 310-312). Counsel's statement on page 74 of appellant's brief that on March 4, 1931, one company cut the price from $1.07 to 67c, is unsupported by any proof or finding, and is refuted by the testimony of Mr. Leverton. Regardless of these regulations the price of crude oil followed a natural course downward responsive to the general conditions in the industry and by reason of increased potentials over the United States as a whole.

By sub-finding (k) of Order 5369, October 28, 1930

(R. Vol. II, Pt. 2, pp. 134-136), the Commission, dealing with the contention of some protestants against the making of the order that proration in Oklahoma was a scheme to maintain prices, declared that its orders have been and are based solely upon the purpose to prevent waste of oil in the state, and in the process of doing so to require ratable or proportional takings in pools where curtailment is necessary to prevent waste, and it there further declared that it had exercised its independent judgment in prescribing the orders and had not attempted to influence the price of oil or refined products, and that if any such effect had occurred it was incidental and not intended. (Finding XXVIII.) It also there found that since 1926 the price of oil had declined 40 per cent and declared that it had never limited production in any pool below the market demand, and further that the prices at which oil was sold were fixed, not by the Commission, but by the free play of competition and the relationship between supply and demand in the world market.

From 65 to 75 per cent of the oil produced in Oklahoma is sold to refiners and purchasers who take it outside of the state; it is sold in the world market for petroleum in competition with oil from other states and foreign countries; practically all of the oil so sold in Oklahoma is sold at a regular posted market price offered by the principal purchasers of oil (Finding XXX, R. Vol. I, Pt. 2, p. 210).

There was "no evidence" before the Commission "that proration in Oklahoma has had any effect upon" the price of oil (Order 5369, R. Vol. II, Pt. 2, p. 134).

In said Finding XXVIII, the court below found that the evidence establishes that in each instance the Commission had allowed to be produced the full amount of the market demand for oil in each pool, and that there was no evidence in the case to the effect that there was a demand for more oil from any pool than the Commission had allowed to be produced.

The question of price fixing was one of fact, and the plaintiff does not, in the statement of the points upon which it would rely in this court (R. Vol. I, Pt. 2, pp. 406-411), question the correctness of these (or any other) findings of the trial court (par. 9, Sup. Ct. Rule 13). It therefore seems to us that these findings conclude the question here.

On page 106 of plaintiff's brief, it is stated in the heading that

> "the Commission has not at any time undertaken to protect the co-equal rights of the surface owners except during such periods as over-production was threatening the price structure."

The implication of this statement is that a threat to the price structure is the reason for proration. The statement is clearly incorrect when regard is had for the language and purpose of the act and the plainly-expressed intent and purpose of the orders of the Commission.

Section 4 of the statute does not provide for proportional taking except in one event, namely, whenever the full production from the common source of supply can be had only under conditions constituting waste as defined in the statute. This is a limitation upon the power of the Commission to order proration.

The proration orders involved in this action were, it is true, all issued at times when there was an "over-production," that is, a potential production in excess of market demands; in the affected pools, but they were not issued because the price structure was threatened, but, on the contrary, because of threatened waste of a most serious nature and in order to protect the correlative rights of the producers in the pools where that threat existed. The Commission found from evidence adduced at duly-conducted hearings (Finding X, R. *ibid* 189) that this threat of waste and injury to correlative rights was imminent. (See, Finding XXIV, R. *ibid,* pp. 199-200; also Finding VII, pp. 187-188.) The testimony it so received is in evidence here (R. Vol. II, Pt. 4, pp. 315-389). Without said evidence, it inescapably follows from the mere fact that the potential production in a pool is greatly in excess of the storage and transportation facilities therein, and reasonable market demands therein, that the commission of waste and the destruction of co-equal rights are threatened, and are, in fact, inevitable if measures for their prevention be not taken. If the conditions operate as a threat to price structure, such threat is a mere incident to the major threat of waste and co-equal right destruction.

Counsel cite and quote from the case of *McMillan* v. *Railroad Commission of Texas,* 51 Fed. (2d) 400. The opinion of the three-judge court in that case was predicated, as we interpret the opinion (we have not seen the findings of fact), upon a finding of fact, of the correctness of which we cannot judge, that the orders of the Texas Railroad Commission involved therein were made for the ulterior pur-

pose of maintaining a higher price for crude oil. We understand that an appeal is being taken from the decree therein to this court, and for that, as well as other reasons, we do not regard the case as an authority here.

Counsel for plaintiff (plaintiff's brief 107-110) quote and seem to place considerable emphasis upon certain selected recitals in the "opinion" of Honorable Paul Walker, Chairman of the Commission, handed down February 10, 1931 (Order 5437, R. Vol. II, Pt. 2, pp. 190-202). Chairman Walker, who assumed the duties of his office one month before the date on which he read said opinion (Finding I, R. Vol. I, Pt. 2, p. 177), fully explains what he meant by the expression that the market demand for oil is "a thing wholly elusive and most difficult, if not impossible, of determination," and the particular reason which prompted some of the parties to the proceeding to express a desire "to preserve the market stability and to protect interests elsewhere", and "the least possible market competition," and to suggest "the limiting of takings to the actual visible market capacity, and that, of course, on a ratable basis"; but plaintiff's counsel do not call attention to these explanations which Chairman Walker made. We respectfully refer the court to them by references to the record (R. *ibid*, pp. 194, 195, 198-199).

Following said opinion, the Commission itself increased the allowable production in said pool from 85,000 barrels to 125,000 barrels (R. *ibid*, pp. 202, 204).

From the portions of said opinion to which we have referred, three things are made clearly to appear, namely:

First, that the elusive market demand referred to was not the actual visible market demand for oil in the Oklahoma City pool, but was a demand which some of the protestants called "nebulous," in that it was for indeterminate amounts from undisclosed bidders;

Second, that the Commission was doing everything in its power to provide as large a market outlet as possible for the Oklahoma City pool, and was even willing to take a chance on the market absorbing the greater amount of allowable; and

Third, that the reference to the price of oil and the possibility of its declining below the cost of the operation of from 30,000 to 60,000 old stripper wells scattered over the state, or the Oklahoma City pool completely absorbing the market for oil from said wells, if the allowable in the Oklahoma City field should be increased, was merely a recital by Chairman Walker of arguments made by some of the protestants at the hearing. The significant fact is that after reciting the said argument and objections, the Commission proceeded to make an order increasing the allowable from the Oklahoma City field regardless of its possible effect upon the price of oil as adverted to by the said protestants; and hence Mr. Walker's opinion and the order of the Commission conclusively show not only that the price was not the controlling factor, but that the Commission refused to be controlled by the attitude of protestants who desired the price structure maintained for the protection of their "interests elsewhere," that is, in the old stripper wells. The opinion nowhere indicates that any producers

advanced any other or different reason than the one just mentioned, for preserving market stability.

As a part of their contention that the orders were price fixing, counsel argue (plaintiff's brief, p. 111) that the Commission allocated the markets to the different pools and *shifted them around "to suit itself."* That this position is contrary to the facts, see our discussion under the heading, "No Discrimination Against the Oklahoma City Pool."

If the law is within the sphere of legislative authority, then all questions relating to its incidental or indirect effects are to be addressed to the lawmakers and not to the courts.

If this statute, enforced as it has been by the Commission strictly in accordance with the legislative intent, has incidentally tended to promote the prosperity of the oil industry in Oklahoma or of the state generally, or to prevent economic demoralization, then it is not to be condemned but rather upheld for that reason. Cases which we consider in point are the following:

Bacon v. *Walker,* 204 U. S. 311, 51 L. ed. 499;

Sligh v. *Kirkwood,* 273 U. S. 52, 59 L. ed. 835;

C., B. & Q. R. Co. v. *People,* 200 U. S. 561, 50 L. ed. 600;

Liberty Warehouse Co. v. *Burley,* 276 U. S. 671, 72 L. ed. 475;

C. C. Julian Oil & Roy. Co. v. *Capshaw,* 145 Okl. 237, 292 Pac. 841;

People v. *Associated Oil Co.,* (Calif. Sup.) 294 Pac. 717.

In *Bacon v. Walker, supra,* after extensively reviewing several of its previous decisions, including *Ohio Oil Co.* v. *Indiana,* and referring to certain objections made by counsel for the appellant, this court said:

> "This view of the power (the police power) of the state, however, is too narrow. That power is not confined as we have said, to the suppression of what is offensive, disorderly or unsanitary. *It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited."* (Italics ours.)

NO DOMINATION BY MAJOR COMPANIES.

In plaintiff's brief, counsel, in stating the facts (pp. 11-21) have attempted to show that proration in Oklahoma has been controlled by the so-called "State-Wide Proration Committee," the membership of which, according to the statement, is "named by certain operators" and represents, not producers generally, but certain powerful producers, some of whom are large purchasers and refiners. Counsel say that "the control thus fixed in this committee, and its membership in succession has remained definitely constant." (Plaintiff's brief, p. 12.)

The alleged purpose of the alleged control is to favor the Seminole area over the Oklahoma City pool in respect of its market outlet and another alleged purpose is to maintain a high price for crude oil, although chief emphasis is placed on the former.

The State-wide Proration Committee is to be distinguished from the several Operators' Committees which were appointed by the Corporation Commission, one for each prorated pool. The latter was in each case appointed for the purpose of aiding and assisting the umpire and Commission in the administration of the order in so far as it applied to the pool for which they were appointed. These appointees were approved by the governor (R. Vol. II, Pt. 2, pp. 221-231).

The facts with reference to the personal interests of the companies with which the members of the former committee are associated are these, namely:

Prior to October, 1930, C. C. Herndon, connected with the Skelly Oil Company, was chairman of said committee. That company is not a purchaser of oil in either of these areas, and while it has production in both of them, it has a much larger potential production in the Oklahoma City pool than in the Seminole area (R. Vol. II, part 1, pp. 7, 13). The personnel of the committee was changed in October, 1930. At the time of the trial of this suit in June, 1931, the committee consisted of Messrs. Alvin Richards, chairman, Burdette Blue, vice-chairman, Joe Sidwell, R. M. Young, Wirt Franklin, Mr. Filley, Mr. Nicholas and H. B. Fell (R. Vol. I, part 2, p. 337). Alvin Richards, chairman of the new committee, is the attorney for The Pure Oil Company, which has production in the Greater Seminole area but none in the Oklahoma City pool. Burdette Blue, vice-chairman of the committee, is executive vice-president of the Indian Territory Illuminating Oil Company, which

has production in both areas, but a very much larger potential production in the Oklahoma City pool *(ibid,* p. 337). That company is a subsidiary of the Cities Service Company, of which also the Empire Pipe Line Company is a subsidiary, and the "Empire" is a purchaser of oil in both fields, having a pipe line capacity of 10,000 barrels in the Seminole and of 40,000 to 45,000 barrels in the Oklahoma City pool (plaintiff's Exhibits 16 and 17, R. Vol. II, part 1, p. 11). The "I. T. I. O." owns about one-third of all the wells in the Oklahoma City pool and has the largest potential production of any company there (R. Vol. I, part 2, p. 263). Joe Sidwell is connected with the Prairie Oil & Gas Company which has production in both areas, although its largest potential production is in the Seminole *(ibid,* p. 284). The "Prairie" has a pipe line capacity of 110,000 barrels in the Seminole area and of 45,000 to 50,000 barrels in the Oklahoma City pool (R. Vol. II, part 1, p. 11). However, the Prairie Oil & Gas Company had discontinued entirely the purchase of oil at some time prior to the hearing below in June, 1931 (R. Vol. I, part 2, p. 297). R. M. Young is the president of The Carter Oil Company, a subsidiary of the Standard Oil Company of New Jersey, and the Carter has production in the Greater Seminole area but none in the Oklahoma City pool *(ibid,* p. 281). The Oklahoma Pipe Line Company, a purchasing company, and a subsidiary of the Standard Oil Company of New Jersey, has a pipe line capacity of 80,000 barrels per day in the Seminole area and of 20,000 barrels per day in the Oklahoma City pool (R. Vol. II, part 1, p. 11). Wirt Franklin is president of the Wirt Franklin Company and is inter-

ested as a stockholder in the Cromwell-Franklin Company (R. Vol. I, part 2, p. 269). Said companies have a very large potential production in the Oklahoma City pool, but none whatever in the Seminole area *(ibid,* p. 337). Neither of said companies is a purchaser of oil. Mr. Filley is connected with The Texas Company which has production in the Seminole area, but none in the Oklahoma City pool *(ibid,* p. 284). The "Texas" has a pipe line capacity of 24,000 barrels per day in the Seminole area, but none in the Oklahoma City pool (R. Vol. II, part 1, p. 11). Mr. Nicholas is with the Continental Oil Company of Ponca City which has production in both areas *(ibid,* pp. 8 and 13; Vol. I, part 2, p. 337). Said company has no pipe line in the Seminole area but has a pipe line capacity of 25,000 barrels in the Oklahoma City pool (R. Vol. II, part 1, p. 11). H. B. Fell of Ardmore, who is not connected with any company but is a so-called "independent oil producer," as a member of the committee represents the Southern Oklahoma producers (R. Vol. I, part 2, p. 283), that is, producers in the pools in southern Oklahoma which do not include any pool in the Greater Seminole area nor the Oklahoma City pool, both of which are, generally speaking, in the central part of the state. It does not appear in the record whether he is interested in production in either of these areas.

This committee, according to the witness Collins, "functions as a fact-finding and advisory committee, finding the facts, showing the potential production and the demand for crude oil in the State of Oklahoma, * * * and they make recommendations to the operators in the pools, 'over in the Seminole and other parts of the state'; * * *" (R. Vol. I,

Pt. 2, p. 283), at general meetings of the operators called for the purpose of considering the amount of the market demand for oil from each of the areas which were subject, under the statute, to be prorated. Its sole sponsorship was an association of producers known as the Mid-Continent Oil & Gas Association. In the first instance, Umpire Collins (who was employed in 1926 by the operators at the instance of the then existing advisory committee to act as umpire in the Seminole area under voluntary proration, and who in 1927 was, by the Commission, appointed umpire for the Seminole area, and later, when in 1929 the Oklahoma City pool was also placed under proration, was appointed by the Commission as state-wide umpire), with the assistance of Mr. Mapes, statistician for the Mid-Continent Oil & Gas Association, made surveys to ascertain the amount of oil which the several purchasing companies intended to take from the different prorated areas during the next succeeding few months *(ibid,* p. 284), and he submitted the information thus procured to the operators and their various committees, and then when petitions were filed with the Commission for proration orders the same information was submitted under oath to the Commission. In January, 1931, the Commission adopted the practice of subpoenaeing representatives of purchasing companies to appear before it to give testimony as to the amounts of the intended purchases.

The Commission, in its various orders, so far as they have been introduced in evidence here, found as a fact from the evidence before it, that the producers and purchasers in the

several pools were consulted at meetings of all the producers and purchasers which were held, at which the factors affecting the allowable production in the several pools were considered, and that the schedule of allowable production in the several pools, as set out in the Commission's order, represents the concensus of opinion of the producers and purchasers as to the reasonableness of arrangement, necessity and convenience of producers and purchasers, and equity as between the various common sources of supply (Order 5189, June 30, 1930, R. Vol. II, part 2, page 93; Order 5369, October 28, 1930, *ibid*, 130; Order 5413, December 30, 1930, *ibid*, 167).

Thus, it appears not only that most of the companies with which the members of the state-wide committee are associated have very large producing interests in the Oklahoma City pool, but also that the committee in reality represents all of the producers of oil, and also that the producers, called "operators," considered the distribution which the purchasing companies made of the market outlets for the several areas, and that at meetings of said operators they acquiesced in such allocation of market outlets and regarded same as fair and equitable. These facts positively negative committee control of proration in the special interests of any company or companies with which committee members were connected having production in any of said areas; or the exercise of any supervision without regard to the welfare of the producers themselves, either large or small.

The undisputed testimony is that the amount of allow-

able production which the Commission found and fixed in its orders corresponded to the amount of the market demand for oil in each pool (R. Vol. I, part 2, p. 298; Finding XXVIII, *ibid* 209).

The drilling of new wells resulted in the potentials in the Oklahoma City pool increasing by leaps and bounds; and it appears without contradiction in the record that both the state-wide committee and Mr. Collins "attempted from time to time to induce the purchasing companies to buy more crude oil from the Oklahoma City field, and that they did give their promise that they would do so" (Finding XXVII, *ibid* 208). Also, that others made such efforts *(ibid* 293).

The Corporation Commission itself has made like efforts (Order 5434, Feb. 10, 1931, R. Vol. II, part 2, p. 204; see also, Order 5369, Oct. 28, 1930, R. *ibid,* pp. 132-33).

The co-operation of the producers of oil in the administration of the act in question is to be commended. As we have pointed out in discussing the conditions which obtained in 1914 and 1915, this law was passed to prevent waste and for the protection of the co-equal rights of all producers. The fact that said producers, for the protection of whose co-equal rights this law was enacted, not only take advantage of the existence of the law and desire to utilize it in the prevention of a recurrence of the deplorable conditions which obtained prior to its enactment, but also may actively seek its enforcement for said purpose, is certainly not to be condemned.

The Corporation Commission in making and entering the proration orders here in question acted at all times upon its own independent judgment. (See, Finding XXVIII, R. Vol. I, part 2, p. 209.) It made no orders without the reception of full testimony. Its general orders invariably recite this fact, and several of its special orders make particular mention of the fact that considerable testimony was received. Before conducting hearings, applications under section 6 of the act were filed with the Commission. For a long time these were filed by Wirt Franklin, who was not personally interested, directly or indirectly, in any well in the Seminole area (R. Vol. I, part 2, p. 337).

The orders, rules and regulations of the Commission were made and entered upon petitions filed by interested persons, after proper notice, and upon sufficient evidence, for the purpose of preventing waste and protecting the co-equal rights of the several owners of land over each pool (Finding XXX, *ibid* 210).

An abstract of a large volume of the testimony taken at the hearing which resulted in the order of October 28, 1930, was introduced in evidence in this case (R. Vol. II, part 4, pp. 315-363).

Thus, it appears that the functions of the so-called "State-wide Committee" were purely unofficial, voluntary and advisory, and it was not invested with, nor did it assume, any powers. *

Under the heading "No discrimination against the Oklahoma City pool," we recite additional facts bearing directly upon the question of alleged committee control.

* See Gorieb v. Fox, 274 U.S. 603
Miller v. Schoene, 276 U.S. 27

NO DISCRIMINATION AGAINST THE OKLAHOMA CITY POOL.

The trial court covered this question in its Finding XXVII (R. Vol. I, Pt. 2, pp. 207-208).

Yet at many places in plaintiff's brief, for example pages 18-19 and pages 89-90, counsel argue that the orders of the Commission have discriminated against the Oklahoma City pool in favor of the Greater Seminole area and the balance of the state. Frequently they have asserted that the Commission arbitrarily distributed and allocated the market demand for oil in the state among and in the various pools "to suit itself" (p. 111) or under the domination and to accommodate the interests of certain operators (pp. 11-18). They compare the large potentials in the Oklahoma City pool with the relatively smaller, though quite large, potentials in the Seminole and then those in the balance of the state, and then compare the amounts of the allowable productions in each of the several areas in an attempt to show that the result of the alleged arbitrary allotment of market outlets is unfair to the Oklahoma City field producers.

In 1930-1931 there were about 60,000 producing oil wells in the so-called "old settled pools" in the state, called in the orders "Class A" pools, which were producing very small quantities of oil per well per day (Order 5369, October 28, 1930, R. Vol. II, Pt. 2, p. 133; Order 5437, February 10, 1931, R. *ibid* 194), aggregating about 250,000 barrels per day *(ibid* 128), with a long established market demand for their full production *(ibid* 132). Most of these old pools had

been discovered before the act in question was passed (see Technical Paper 45, Bureau of Mines 1913, by Blatchley, pp. 20-43). The Greater Seminole area discovered at the cross roads of already existing major trunk pipe lines, contains eight or more distinct and separated pools, the first of which was discovered in 1925, now has 2441 producing oil wells with a potential capacity of 564,908 barrels per day (Finding VI, R. Vol. I, Pt. 2, p. 183), and a market demand for about 175,000 barrels per day. The Oklahoma City pool, about 65 miles west and somewhat north of the Seminole area, was discovered in December, 1928, and now has 746 producing oil wells with a total potential capacity of 2,987,993 barrels per day (when divided by three). (Finding VI, R. *ibid* 184; see, also Finding XIV, *ibid* 193), and a market demand of 185,000 barrels of oil per day.

Counsel (plaintiff's brief, p. 112) cite and quote a portion of the order of October 28, 1930 (R. Vol. II, Pt. 2, p. 132), as conclusive evidence that the Commission was arbitrarily allocating markets. But, counsel fail to explain that the quoted part of the order has reference only to Class A pools, which the Commission had never before prorated. The provision was (R. *ibid,* p. 142) that all leases in said pools having a potential production in excess of an average of 5 barrels per well per day should be curtailed 50% of the excess over 5 barrels per well per day average. They omit to quote the following pertinent portion of the order (R. *ibid,* p. 132):

> "In this connection, the Commission finds that a number of purchasing companies desire to and have already *reduced* the amount of their purchases in the

> so-called older pools in the state not heretofore prorated under order of this Commission, and that said purchasers *desire* to purchase a greater amount of oil in the Oklahoma City pool than they have heretofore taken. The Commission further finds that, by reason of the readjustment of purchases as herein stated as between pools not heretofore prorated and the Oklahoma City pool, the potential production of said pools not heretofore prorated will exceed the reasonable market demand therefrom, * * *" (Italics ours.)

The remainder of the sentence is quoted by counsel on page 112 of their brief.

Counsel's position and argument presupposes a power in the Commission to transfer markets from one pool to another; to effectively say to a purchaser that he or it shall purchase oil at the place and in the amount which the Commission may determine; and in fact it is asserted that the Commission has arbitrarily exercised this power. Then, apparently forgetting this necessary presupposition contained in the contention, and ignoring their argument elsewhere made, in effect that to avoid discrimination, the Commission should allocate markets among the fields in proportion to their respective potentials, they say (plaintiff's brief, p. 113) that the act

> "cannot validly authorize the Commission to take from one field any part of its market and assign or shift it to another and that if the act is capable of that construction it violates the Fourteenth Amendment in that it takes from one or more operators in a given field their business without any corresponding advantage, and gives it to another."

The contention that there has been discrimination overlooks the basis of the classification (see, *Lindsley* v. *Natural Carbonic Gas Co., supra*) of the several prorated areas which was adopted by the Commission, and the only basis, so it seems to us, which it could have adopted.

There is a criterion or standard fixed by section 4 of the act which alone must be applied in order to determine whether any pool has been discriminated against. It is the ratio between the potential production of the pool and the amount of oil that can be produced therefrom without waste.

The Commission in several of its orders declared this to be the standard which it adopted (*e.g.*, Order No. 5369, October 28, 1930, R. Vol. II, Pt. 2, pp. 130-131), thus demonstrating that it had a correct conception of its authority and duties under section 4.

The trial court's Finding XXVII (R. Vol. I, Pt. 2, pp. 207-208) is that there was no such discrimination as is alleged, and also that

> "the basis upon which the Commission classified the different prorated pools for the application of the varying percentages of allowable production therein as shown by its several orders was the existing relation between the potential production of each pool and the amount of crude oil which could be produced therefrom without waste. * * * Said relation was not the same in all the prorated pools and therefore the percentages of curtailment necessarily varied as between pools."

The court there found, as did the Commission in its various orders, that the pools were not all served in com-

mon by the same pipe lines and purchasers; also that the reasonable market demand for certain of the pools was greater in proportion to the potential production thereof than in the case of others; that some of them were older than others and had been prorated longer than others; that in some of the pools there are purchasers whose local facilities are not extended to others and that in some of the pools there has been more intensive drilling and wells of larger capacity have been brought in than in others.

Therein the court also found that the Commission had ascertained and recognized the reasonable market outlet for each of the pools and that having done so no unfair discrimination as between pools resulted.

Indeed, the Commission would have made an unreasonable order if it had placed all of the pools upon the same percentage basis.

In view of the facts recited above it is no surprise that the Oklahoma City field has had difficulty in developing a larger market and in increasing its market outlet from time to time. The Seminole area is still a very prolific producing area with approximately 200,000,000 barrels yet to be recovered (R. Vol. I, Pt. 2, p. 343). The old settled fields have and will produce oil for a long time although very small amounts per well per day. Buyers of crude oil had their investments in pipe lines and tankage incident to their connections made with these old settled pools and the Seminole area before the Oklahoma City pool was discovered. Naturally the Oklahoma City field producers feel that since the potential production of the field is so tremendously large

as compared to the potential of the other fields in the state, the purchasers of crude oil should take more of their production than they do, and plaintiff made and introduced Exhibit No. 11 in an effort to emphasize this; but the facts which we have just recited cannot be disregarded by purchasers of oil and there may be much merit in their view that it is unreasonable to expect them to discontinue their takes from the old settled pools and in the Seminole area, which is considerably older than the Oklahoma City pool, in order merely to meet the desires of the Oklahoma City field producers. To do so would involve the discontinuance of the use in large measure of their present facilities in the older areas and at the same time involve large additional expenditures in increasing their facilities for taking additional Oklahoma City production, in the case of those now taking oil from said field; and would involve large initial expenditures attending the entry of said field for the first time by those not already connected therewith. Even so, they did at one time in the fall of 1930, reduce their takes from the old settled pools merely in order to be able to make some increase in their purchases at Oklahoma City. (Order 5369, October 28, 1930, R. Vol. II, Pt. 2, p. 132.) This merely presents the picture from the standpoint of the purchasing companies as we understand it, and with which, in point of fact, the issues in this case have nothing to do. We present them for the information of the court, primarily for the purpose of showing that there are two sides to the question as to whether or not the purchasing companies (not the Commission) have discriminated against the Oklahoma City field. The day will come, as it has always done in the case of every

newly-discovered field, when the Oklahoma City field will reach the settled production class, and then still later the so-called stripper class; and no doubt when that day arrives, there will be other new flush fields within the state with large potential production. When that day shall come, it is likely that the plaintiff will be on the other side of this question, for it will then want the new pools held down. It will doubtless feel that new pools should not interfere with the markets of the old pools.

The plaintiff has not introduced any testimony whatsoever to show that the amount of the market demand for crude oil in the Oklahoma City field has at any time been any larger than the amount found and fixed by the Commission. It must, therefore, be accepted as true that the Commission's conclusion on that subject is correct. Collins testified that it was, and the trial court so found.

As we have remarked, and as plaintiff's counsel declare, the Commission has no power to require any purchasing company to buy oil in a field where it does not desire to purchase any, or to increase its takes from any field wherein it is making purchases. We doubt if the State of Oklahoma could lawfully require things of that sort to be done.

The power of the Commission to prevent unreasonable discrimination between pools is the power to classify the fields where such discrimination should be prevented.

Such a classification by the Commission does not offend against the equal protection clause of the Constitution, and a court is not to strike it down *if any state of facts reason-*

ably can be conceived that will sustain it. The governing rule is stated in the case of *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. ed. 369.

The comparisons which plaintiff makes between potentials and allowables furnish no suggestion in view of the existing conditions recited above, of a reasonable basis for classification of the pools, for they take into account only one of a large number of facts and circumstances which must be considered, thus limiting the exercise of the discretion to a consideration of it alone, whereas, when all the facts and circumstances are considered as they necessarily must be, it appears that the isolated one selected by the plaintiff has the least probative force of any of them, and if adopted, would necessarily result in an arbitrary classification.

The comparisons which counsel make are superficial and deceptive.

Comparisons similar to those made by the plaintiff, even without a consideration of the more vital factors above set forth, at once disclose that the percentage of allowable production in the Oklahoma City pool is not, under the circumstances, unfair to the producers therein.

The percentage of allowable production for the Oklahoma City field, to-wit, 2% or 6% (depending upon how the potential for the field is arrived at) is larger than the percentage of allowable production in the Yates pool in West Texas, namely 1.3%. It compares favorably with the percentage of production in the Hobbs pool in New Mexico, namely, 3%, which is prorated by agreement of the pro-

ducers with the consent of state authorities. The Yates pool had a potential production of 5,496,000 barrels and a market outlet of 70,000 barrels per day. The Hobbs pool had a potential of about 1,325,000 barrels and a market outlet of 37,000 barrels a day (Stalcup, R. Vol. I, Pt. 2, pp. 359-361).

The Oklahoma City field in barrels of oil produced per day, namely, 185,000 or more barrels, is not exceeded by any pool in the United States. It is enjoying the largest market outlet of them all. It produces each day more than any other single pool in the United States. The East Texas area produces about 320,000 barrels per day, but it is composed of three separate and distinct pools, no one of which produces as much per day as the Oklahoma City pool (R., *ibid*, 359).

The wells in the Oklahoma City field under their allowed production average about 250 barrels per day, whereas, the wells in the Greater Seminole area average about 50 barrels per day. (McWilliams, R., *ibid*, 344.) In other words, each of the Oklahoma City field wells produces about five times as much per day as each of the wells in the Greater Seminole area.

The oil yet to be recovered in the Oklahoma City field is estimated at 260,000,000 barrels and that yet to be recovered in the Greater Seminole area is estimated at 200,000,000 barrels. The present market outlet for the Oklahoma City field is approximately 185,000 barrels which increased to about 200,000 barrels shortly before this case was tried, and the present market outlet for the Greater Seminole area is approximately 175,000 barrels per day.

If the two fields should continue from now on to produce said amounts, *respectively*, then the two fields would recover the amounts of recoverable oil therein respectively, within approximately the same period of time (R., *ibid*, 343-344).

The foregoing comparisons demonstrate that in coming to a conclusion as to whether the Oklahoma City field has been discriminated against, one cannot rely, as plaintiff does, upon a comparison of the cold percentage figures, to-wit, 2% or 6%, as the case may be, in the Oklahoma City field, and 50% in several of the pools of the Greater Seminole area. If one desires to form an opinion from looking at cold figures rather than to investigate the reasons for and the conditions which require the particular allowance which is given to the Oklahoma City field, then it would be better and more logical to look not to the percentage figures, but to the production per well per day figures and the figures showing the actual production in the various oil fields of the United States, respectively, and to compare them.

DISCRETION VALIDLY VESTED IN COMMISSION.

The authority conferred upon the Commission was not an invalid delegation of legislative power contrary to section 1, article 4, and section 1, article 5 of the Constitution of the State of Oklahoma.

—*C. C. Julian Oil & Royalties Co.* v. *Capshaw*, 145 Okl. 247, 292 Pac. 841 (syl. 2);

Quinton Relief Oil & Gas Co. v. *Corporation Commission*, 101 Okl. 164, 224 Pac. 156 (syl. 3);

United States v. *Grimaud*, 220 U. S. 506;
Marshall Field & Co. v. *Clark*, 143 U. S. 694;
Jacobsen v. *Massachusetts*, 197 U. S. 11;
Miller v. *Schoene*, 276 U. S. 272;
Plymouth Coal Co. v. *Pennsylvania*, *supra*.

GAUGES AND POTENTIALS.

The making of regulations by the Commission for the gauging of wells is merely a procedural step in the execution of the law and it necessarily involves the exercise of some degree of discretion by the Commission; and the method prescribed by the Commission is not only reasonable but is the most practical one available.

(a) *The statute, and authority of the Commission.*

Section 5 of the statute does not require that the Commission shall itself nor that any agent or representative of the Commission shall personally take or witness the gauging of the wells. This section reads as follows:

> "That for the purpose of determining such production, a gauge of each well shall be taken under rules and regulations to be prescribed by the Corporation Commission, and said Commission is authorized and directed to make and promulgate, by proper order, such other rules and regulations, and to employ and appoint such agents with the consent of the governor, as may be necessary to enforce this act."

It is the obvious purpose of the gauging provision of section 5 to carry the ratable taking provisions of section 4 into execution.

The legislature realized that conditions in the various oil pools of the state would no doubt be such that a fixed and stereotyped method which it might prescribe for the gauging of wells would not in many instances be of practical application. *Gorieb* v. *Fox,* 274 U. S. 603, 607, 71 L. ed. 1228, 1230; *Plymouth Coal Co.* v. *Pennsylvania,* presently to be quoted in part. This is well illustrated in the case of the wells in the Oklahoma City pool. The wells in the Seminole pool have been gauged by allowing them to flow wide open for twenty-four consecutive hours and the production run into lease storage tanks, and at the end of the time, the amount of oil produced during the time, as contained in the tanks, was measured or gauged, and thus the potential capacity of the well, that is, the amount of oil it was capable of producing within a 24-hour period, was determined; but in the Oklahoma City pool the wells produce such large quantities of oil, many individual wells being capable of producing in excess of 50,000 barrels per day, that it was impracticable, if not impossible, to operate them wide open for twenty-four consecutive hours. (See Finding XXV, R. Vol I, Pt. 2, pp. 200, 204.) In order 5437, February 10, 1931, the Commission found that it was "a physical impossibility" to flow all of them wide open for 24 consecutive hours because of inability to find storage for the oil. (Finding XIV, *ibid,* p. 193.)

So, in order, to gauge the wells in said pool, the Commission adopted a rule to the effect that each well should be permitted to flow wide open for a period of four consecutive hours and that the amount of production had during

said period should be multiplied by six to extend it to a 24-hour basis. In the industry this is regarded as a proper way to gauge a well (Clifton, R. Vol. I, Pt. 2, p. 262).

In one respect, the legislature imposed no discretion in the Commission, for it affirmatively required (Sec. 5, quoted above) that a gauge of each well shall be taken. But, it left to the discretion of the Commission authority to prescribe the time and manner of taking such gauges and *by whom they should be taken.*

In *Plymouth Coal Company v. Pennsylvania,* 232 U. S. 531, 58 L. ed. 713, which involved the constitutional validity of the Pennsylvania statute relating to leaving pillars of coal along the lines of adjoining properties, the court said:

> "The legislature has not defined with precision the width of the pillar, and it is very properly admitted that, in the nature of things, this would have been impossible because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule."

(b) ***The gauging regulations and their operation.***

The objections which plaintiff makes to the gauging of wells and the determination of potentials are as this court in the *Plymouth Coal Company* case said, "hypothetical rather

than practical." (232 U. S. 544, 58 L. ed. 719.) This will appear from what we shall say.

The statement in plaintiff's brief (pp. 90-95), of the regulations of the Commission on the subject of gauging wells is quite incomplete, and in many respects is inaccurate and misleading. We respectfully refer the court to the trial court's Finding XXV (R. Vol. I, Pt. 2, pp. 200-205), where the regulations and the practices thereunder are fully described. See, also, Findings XIII and XIV *(ibid,* pp. 192-194).

As we elsewhere show, the regulations which the Commission prescribed, including those relating to gauging, were in all cases made after notice to all parties concerned, and a hearing duly had at which interested persons were given every opportunity to be heard. The plaintiff, therefore, had notice and an opportunity to be heard in the framing of the gauging regulations.

The so-called "percentage basis of proration" has obtained in every prorated pool except the Oklahoma City pool, and it has obtained in the Oklahoma City pool since January 3, 1931. Prior to that date, the Oklahoma City pool was prorated on what was known as the "time basis." The "percentage of potential basis" consists of permitting every well to produce a percentage of its capacity to produce as theretofore established by a gauge of such capacity. The "time basis" of proration consisted in allowing each well to produce wide open for only a certain percentage of the time in a given period (Finding XXV). In applying the time method in the Oklahoma City pool prior to

January 3, 1931, all the wells in the pool were grouped into classes and all the wells of one class were allowed to be operated wide open at the same time and for the same length of time, and then they were closed-in completely until each and every other group of wells had been operated in like manner for a like period of time. Each method resulted in the production daily of the total amount of the per day allowable production for the pool and was intended to and did place every operator upon an equal or ratable basis.

These regulations were reasonable (Finding XXV).

Gaugings in the several pools were conducted in accordance with the prescribed regulations (Finding XXV).

Prior to December 30, 1930, some operators in the Oklahoma City pool petitioned the Commission to enter an order changing the operation of said pool from the "time basis" to the "percentage of potential basis," and after a full hearing, this petition was granted (Finding XXV; Order 5414, December 30, 1930, R. Vol. II, Pt. 2, pp. 180-190). The Commission had previously considered this question (Order 5396, December 4, 1930, R. Vol. II, Pt. 2, p. 154).

The Commission, in effecting said change by said Order 5414, found it necessary to take into consideration the relative positions in respect of ratable production of the several wells in the Oklahoma City pool as they existed at the date said order took effect, that is, January 3, 1931, by reason of the fact that they had been operated prior to that date according to the time basis; and to also take into account the fact that some wells were already somewhat

under-produced and others somewhat over-produced (conditions which were inevitable under either plan of proration). We deem it unnecessary to deal with the particulars of the manner and method in which the Commission solved these difficult problems with the view of working out a plan which would place each operator upon an equal basis as nearly as practicable. The order sets forth these details.

The testimony shows that the umpire multiplied by six the amount of oil shown to have been produced in the 4-hour open-flow period of each well gauged, thus extending the gauge to a 24-hour basis (Cosan, R. Vol. I, Pt. 2, p. 304). How these were reported to all the producers (once each month) is shown in plaintiff's Exhibit 24 (R. Vol. II, Pt. 1, pp. 37-78).

It was said by some that the potential of the Oklahoma City pool was "exaggerated" (Collins, R. Vol. I, Pt. 2, pp. 290-291). The extremely large producing capacities of the wells in said pools and their high gas pressures and the fact that the field has at all times been in a highly flush stage of production, not yet having reached a so-called "semi-flush" stage, resulted in the practical impossibility of providing sufficient storage facilities for the production which would result if in taking the gauges all of the wells were flowed at full capacity for any considerable length of time. It was believed that if it had been possible as a practical matter to flow the wells continuously for twenty-four hours, their production during the last few hours of the period would be at the rate of about one-third of their production during the first four hours of the period. (R. Vol. I, Pt. 2, pp. 261-

263, 266-267, 291, 345; R. Vol. II, Pt. 2, pp. 201-202.) Out of this grew the issuance of the Commission's "revised formula" (Finding XIV, R. Vol. I; Pt. 2, pp. 193-194), which provided that the potentials as shown by the 4-hour gauge multiplied by six should be divided by three (R. Vol. II, Pt. 2, pp. 204, 205, 206). The potential on February 10, 1931, the date of the order, was thus determined to be 2,000,000 barrels instead of something over 6,000,000 barrels, and the percentage of allowable production was fixed at 6-1/4 per cent instead of 2.08 per cent (R. *ibid,* p. 204). There is not much difference between this and the estimation which, though criticizing the formula, the plaintiff's geologist made (R. Vol. I, Pt. 2, pp. 264-266). The trial court found (R. *ibid* 204) that the revised formula as well as the potential plan prescribed by the Commission for use in the other areas,

> "arrived at approximately accurate results; that the orders of the Commission fixed the allowable of every producing well in the Oklahoma City field at the same relative proportions of their respective potentials, and that said orders did likewise in every other prorated field; that there has been a substantial compliance with section 5 of the Oil Conservation Act; and that no discrimination between producing wells resulted from the methods by which the potentials were determined; * * *."

On page 92 of plaintiff's brief, an order of November 8, 1930 (Order 5387, R. Vol. II, Pt. 2, pp. 151-154), is referred to in such language as to indicate that it might apply to the Seminole and Oklahoma City areas, and counsel there quote a provision of the order with reference to the power

of the umpire and operators' committee to exempt certain wells from the operation of the order. The fact is that said order does not deal with gauges. It is an order applicable exclusively to certain old settled pools located in certain counties in southern Oklahoma, where the wells were producing very small amounts of oil per day.

On page 93 of plaintiff's brief, an incorrect statement is made with reference to an order of December 4, 1930 (Order 5396, R. Vol. II, Pt. 2, pp. 154-159), entered while time proration obtained in the Oklahoma City pool. After saying that each operator in the Oklahoma City pool shall be allowed to produce four (4) hours continuously, counsel say "and thereafter required to shut in his wells for 65 days, and for longer than that if he got more than his proportion of the oil, *according to his unofficial report,* not according to the report of any sworn official of the state." The italicized words are italicized in plaintiff's brief. The erroneous statement we call attention to is the statement, "and thereafter required to shut in his wells for 65 days." Said order does not say anything with reference to shutting in wells for sixty-five days.

Said Order 5369 is an order which, *first,* requires something that was later repeated in Order 5414, namely, that each producer in the pool shall each day file with the Commission a verified written statement with reference to the operation of each of his or its wells during the 24-hour period ending at 7 o'clock a. m. of the day the report is to be filed, and containing certain detailed information with reference to the production from the well, how long it has been on production, etc., and *second,* directing that in computing

the 4-hour period (it was a time proration period) of production allowed by Order 5374, dated November 3, 1930 (R. Vol. II, Pt. 2, pp. 146-150), the 4-hour flow shall be taken continuously and not intermittently, and shall be computed from the hour and minute that oil produced from the well shall first reach the oil and gas separator.' The order then deals with under-produced wells and the making up of their under-production. It is a mere coincidence that at said time and under time proration, each well was allowed to produce for a period of four hours, thus agreeing with the length of time which, after January 3, 1931, the wells in said pool were to be produced wide open in determining their potential capacities for operation on the percentage basis. The 65-day shut-in requirement applied only to wells newly brought in (see Sec. 7 of Order 5413, December 30, 1930, R. Vol. II, Pt. 2, pp. 173-174), and it was never applied to any well after the sixty-five days expired.

(c) ***Plaintiff is not entitled to injunctive relief against the enforcement of the gauging regulations.***

The proration statute being valid, and the Commission having been validly invested with authority to enforce it, including authority to prescribe regulations for the gauging of wells, the following rule announced by this court, speaking through the late Chief Justice WHITE in the case of *Red "C" Oil Manufacturing Company* v. *Board of Agriculture,* 222 U. S. 380, 394-395, 56 L. ed. 240, 246, precludes the plaintiff, even if the criticisms it levels against the method of gauging were well taken, from a right to in-

junctive relief at the hands of the court and relegates it, if it is entitled to relief at all, to the Commission:

> "We have not attempted to enumerate the objections urged against the rules and regulations adopted by the board of agriculture (for the enforcement of the North Carolina oil inspection statute). The court below was clearly right when it observed that if, as the complainant alleged, the standard of safety fixed by the board was unreasonably high, and the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them. A law cannot be declared invalid because, in the opinion of the court, it does not accord with sound policy. The plea for redress in such case must be to the lawmaking power."

This is an application of the same principle which this court, as we elsewhere show, has repeatedly announced shall be applied when a court is passing judgment upon the validity of a particular police regulation, within the scope of legislative authority, namely, that the scope of judicial inquiry in deciding questions of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy, and that whether the enactment is wise or unwise, whether it is the best means to achieve the desired result, or whether the legislative discretion within prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and with the exercise of its discretion in those regards, the courts will not interfere.

(d) *Plaintiff has not shown that it has been injured by the method by which the wells have been gauged.*

The plaintiff in this case has neither alleged nor shown by evidence that there has been any irregularity in the actual gauging of any well, nor that the method by which the wells are being gauged fails to result in the ability of the plaintiff to produce its ratable share of the oil production in the pool where its wells are located, nor (assuming the statute in other respects is valid) that it has been injured in any respect by the particular method which the Commission has prescribed for taking the gauges.

The trial court found (Finding XXV, R. Vol. I, Pt. 2, p. 204) that "there is no evidence showing or tending to show that any frauds were practiced or favoritism shown in connection therewith"; and "that no discrimination resulted as between producing wells."

Unless and until a party shows that he is injured by the operation of a law or a regulation within the law, he is not permitted to challenge the constitutional validity thereof. He must show that an unconstitutional feature thereof injures him.

—*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544-545, 58 L. ed. 713, 719.

The mere possibility of injury is not sufficient.

It follows that even if it be unlawful for wells to be gauged by unofficial persons, or the Commission may have unlawfully attempted to delegate power and discretion in oil operators to take the gauges, or it were a dangerous practice to permit umpires paid by the producers to super-

vise the gauging (questions hereinafter discussed under the headings "Umpires and Operators' Committees" and "The Salaries of the Umpires") nevertheless, inasmuch as the plaintiff has not shown that it has been injured in any respect or that ratable taking has not resulted, it is in no position to question the constitutional validity of this feature of the administration of the law.

However, if, for some reason not observed by us, we are in error herein, then we respectfully submit the following points and argument in response to plaintiff's various contentions.

(e) *A gauging by the owner-operator witnessed by another operator is not invalid.*

By the regulations (see Finding XXV) a well must be gauged by its owner, or if a corporation, a representative of the owner; and the taking of the gauge must be witnessed by a representative of the owner of an adjoining lease, such representative to be appointed by the umpire. When the gauge is made, the owner or his representative and the representative appointed by the umpire must file a written report thereof with the umpire, and in the case of wells in the Oklahoma City pool, the report must be verified and filed with the Commission and a copy thereof with the umpire.

This method of gauging the wells does not constitute the gauging thereof by "private persons" in the sense in which plaintiff contends, but rather the disinterested witness (Finding XXV) appointed by the umpire, represents not only himself but also all other producers.

The gauging of a well is a ministerial act. It requires, it is true, an exercise of mental faculties just as any ministerial act does. But the time of the flow, the fact of the flow, and the quantity of the flow of oil are the only things to be seen and known by the operator and the witness; then, they are to record and report them. Beyond the doing thereof, they have no function to perform.

No one is better qualified to gauge the wells than the operators themselves, experienced as they are in the operation of oil wells.

None of the authorities which are cited by counsel for the plaintiff (plaintiff's brief, pp. 101-102), seems to us to be in point in support of the contention that it is illegal for the gauges to be taken and witnessed in the manner prescribed. We discuss but two of them, the cases of *Washington, etc.*, v. *Roberge*, 278 U. S. 116, 73 L. ed. 210, and *Eubank* v. *Richmond*, 226 U. S. 137, 57 L. ed. 156.

In the *Roberge* case, the court held that:

> "The section (of the zoning ordinance thereir involved) purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—*uncontrolled by any standard or rule prescribed by legislative action*—to prevent the trustee from using its land for the proposed building. The superintendent is bound by the decision or inaction of such owners. *There is no provision for review under the ordinance;* their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. * * * The delegation of power so attempted is repugnant to

the due process clause of the 14th Amendment." (Italics ours.)

In the *Eubank* case, a city ordinance was struck down because it empowered two-thirds of the property owners in a block to determine the extent of the use which all owners in the block should make of the frontage of the properties within the block and required the committee on streets to act accordingly, leaving no discretion in the committee.

It is not so here. Neither the operator who is gauging his own property, nor the appointed representative of some other operator who is to witness the gauge, determines whether the well shall be gauged; the law requires that, and so does the Commission. Neither determines how it shall be gauged; the Commission defines that. They simply open the well, allow it to flow, and measure and report its production.

Section 6 of the act expressly provides that any person, firm or corporation may apply for a hearing before the Commission "upon any question relating to the enforcement of this act, and jurisdiction is hereby conferred upon said Commission to hear and determine the same."

The orders of the Commission without exception reserve jurisdiction in the Commission to make and enter ancillary orders from time to time. Order 5413, December 30, 1930, contains the following provision:

"Attention of the producers in each pool is hereby directed to section 7959, Compiled Oklahoma Statutes (section 6 of the act), which provides that any person, firm or corporation may institute proceedings before the Corporation Commission or apply for a hearing

upon any question relating to the enforcement of the conservation laws. In this connection, producers in each of the pools in Oklahoma are invited to appear before the Commission at any time that they may deem themselves peculiarly injured by the administration of this order in any particular or in any manner discriminated against, and the Commission will hear and act upon the evidence disclosed in such hearing. Notice shall be given to the Umpire and Operators Committee of the intention to thus appear before the Commission on any such question." (R. Vol. II, Pt. 2, p. 174.)

A written report of each and every gauge executed by the well owner's representative and the witness is required and is filed, in the case of Seminole area wells, in the umpire's office, and, in the case of the Oklahoma City pool wells, in the office of the Commission, and a copy in the umpire's office (Finding XXV). In the latter case it must be verified by both of them.

Additionally, in the case of Oklahoma City pool wells, a daily report required of each operator by Order 5414, December 30, 1930, results in the creation of potential and production records available to all producers. These daily reports must be under oath and must show for the preceding day the amount of the allowable production for the then current month, the overage or shortage in production for the preceding month in the case of each well of such operator, the net tentative allowable production for the current month, the production on the day for which the report is made, the balance remaining of the tentative allowable production for the current month, and as to each lease, the amount of oil shipped by pipe line or by tank car, with

the name of the pipe line or the railway company transporting the same, and the name and address of the purchaser of the oil so shipped (R. Vol. II, Pt. 2, p. 187).

In the Oklahoma City pool, obedient to an order of the Commission (R. Vol. II, Pt. 2, p. 188), the umpire prepares each month a long, detailed statement showing the status in respect of potentials, allowables, overages and underages of each and every well in the pool; and each producer therein is supplied with a copy thereof (Cosan, R. Vol. I, Pt. 2, p. 306). The plaintiff's Exhibit 24 (R. Vol. II, Pt. 1, pp. 37-78) is a copy of one of these monthly reports.

Thus, it appears that, not only did the law provide for hearings in the event of complaints in the administration of the law by the Commission, but also the orders of the Commission themselves provided for the creation of records available to each and every producer, from which any producer would be able to determine precisely what was going on in respect of the determination of potentials of all wells and of the production which might be had therefrom. A more comprehensive system, whereby producers are given an opportunity for information as to the status of each and every well on each and every day, and also an opportunity to be fully heard in the event of dissatisfaction or suspicion of, or of the actual occurrence of, improper conduct on the part of any other producer, could not well have been established.

When the system thus set forth is considered in the light of what is held in the *Roberge* case, and of what is said by this court in the *Plymouth Coal Company* case, it

is apparent that there is no analogy between the situation here and that which existed in the *Roberge* case, and that the rule of law there announced has no application. There is not here, as there was in that case, any delegation to private parties of power to determine the rights of any producers, but only a duty to witness and measure the amount of oil which a well produces within a certain number of hours, and the exercise of this duty was at all times subject to review by the Commission. No discretion, susceptible of capricious exercise, is vested in either the operator or in the representative of the umpire. There is no power in either to prescribe any rule or course of procedure, but only authority and instructions to follow a rule of procedure definitely laid down by the Commission.

As a practical matter this is the only system which could have been adopted. It would have been impossible, of course, for the members of the Commission to have observed the periodical gauging of each of the wells—more than 2,000 in the Seminole area and nearly 800 in the Oklahoma City pool. Unless an army of umpires or assistant umpires had been appointed, it would have been practically impossible for directly appointed agents or employees of the Commission to have done so. Serious complaint is made by plaintiff that the producers in the prorated areas have provided funds for the payment of the salaries and expenses of the umpires who have acted, and yet their position demands that a sufficient number of employees shall be selected and paid (not by producers, but by the public at large) to require the contribution of many times the amounts which have been contributed.

Inasmuch as the records which are required to be made fully disclose what was done in the way of gauging wells pursuant to the orders of the Commission, and said records were and are at all times available for the inspection of any producer who might choose to look at them, and inasmuch as ample provision was contained in both the law and the orders for complaints to be made before the Commission and hearings had thereupon, it seems to us that it cannot be said that any constitutional rights have been taken away by the system.

(f) *The supposed opportunity for fraud does not vitiate the system.*

Plaintiff contends in its brief that although it has made no complaint against the gauges of its wells, nevertheless, the amount of oil it is allowed to produce is made to depend upon the gauge of all the wells in the field, and that the opportunity for fraud in the arrangement which the Commission has set up is too great for frail humanity to overcome (plaintiff's brief, pp. 103-104).

This court, in the case of *Caminetti* v. *United States*, 242 U. S. 470, 490, 61 L. ed. 442, 445, in passing judgment upon a case arising under the White Slave Traffic Act of June 25, 1910, said:

> "The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact

and may, if it sees fit, amend the law. *Lake County* v. *Rollins,* 130 U. S. 673, 32 L. ed. 1064, 9 Sup. Ct. Rep. 651."

So, we say here that if the rules and regulations authorized to be and which were prescribed by the Commission may afford opportunities for fraudulent conduct and practices on the part of producers, yet, being, as it is, within the constitutional power of the State of Oklahoma to authorize their promulgation, the opportunities mentioned furnish no basis for striking down the plan and system. The doors of the legislature of Oklahoma are open for its revision. If any officer did the gauging he too might be subject to influence, and the same objection might be made to a plan which so provided.

The Commission is empowered (Sec. 4) to "so regulate the taking * * * as to prevent the inequitable or unfair taking, from a common source of supply, * * * by any person, firm or corporation, * * *" and (Sec. 6) to hear complaints "upon any question relating to the enforcement of" the act.

Although the plaintiff undoubtedly received each month a copy of the umpire's monthly report, and has had access to all the other reports and records hereinabove mentioned, it does not appear that it ever applied to the Commission, making complaint as to the gauge of any well in the pool, or requesting that any well be re-gauged. Nor does it appear that there has been any general complaint respecting the taking of gauges, or any at all, that unfairness or injury has resulted, and the court (Finding XXV) found there was no evidence of any.

In a sense, every producer in a pool is policing the conduct of all other producers therein. It would be quite difficult for undetected fraud to be long practiced by any one or a few of them. Wells and tanks are not far apart, and there is constant commingling of well owners and their employees with other well owners and their employees. Every activity of any producer is easily discoverable by others. The determination, fixed and certain as it is, that no producer or group of producers shall gain any undue advantage over others in their production operations furnishes every assurance that any unfairness or dishonesty will be brought promptly to light and that the guilty parties will be speedily called upon to account for their conduct.

The statement of ex-Attorney General West (R. Vol. I, Pt. 2, p. 371), referred to on page 105 of plaintiff's brief, a statement made during the argument of the case below, that "*I think* the administration of this law by the umpires appointed by the oil companies is iniquitous," is not an "admission" as counsel assert, but merely an expression of opinion. Mr. West did not represent any defendant in this suit, nor speak their views, and his opinion is not justified or warranted by any fact or circumstance proven in this case, and is not supported by the trial court's findings.

UMPIRES AND OPERATORS' COMMITTEES.

There was no non-delegable authority vested in the umpires or operators' committees.

Finding XXVI (R. Vol. I, Pt. 2, p. 205) covers the appointment by the Commission of the umpires and an Oper-

ators' Committee for each separate prorated pool. (See the orders of appointment in R. Vol. II, Pt. 2, pp. 221-231.)

In the brief of the plaintiff (p. 74), plaintiff's counsel make the contention that the Commission had no authority to delegate to the umpires or to the umpires and the operators' committees any jurisdiction of a discretionary nature, and that, to the extent the rules and regulations undertake to do so they are void, and that, consequently, the Commission's rules vesting the umpires with jurisdiction over gauges and the amount of oil to be run by any operator are void.

Section 5 requires that each well shall be gauged although it does not designate who shall gauge them. It further provides that they shall be gauged under rules and regulations to be prescribed by the Commission. It then provides that the Commission is authorized and directed to employ or appoint such agents with the consent of the governor as may be necessary to enforce the act. This negatives the idea that there was any delegation of authority by the Commission to the umpire to conduct or supervise gauges, for the act itself when correctly interpreted is a legislative authorization in the agents of the Commission to perform ministerial duties incident to the taking of gauges. The particular duties are to be specified by the Commission, and that was done. The nature of the power and authority vested in them is ministerial. They are not authorized to prescibe any rules or regulations for the operation of the prorated areas, but are directed only to perform the duties which the regulations of the Commission assign to them.

Before we point out the particular authority which the Commission in fact vested in the umpires or the operators' committees, let us quote the governing rule as expressed by this court in the case of *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 513, 542, 543, 58 L. ed. 718, 719, a passage from which we have already quoted. The Pennsylvania statute involved in that case provides among other things that a mine inspector for each anthracite coal region district should be appointed by the governor of the commonwealth upon the recommendation of a board of examiners composed of three reputable coal-miners and two reputable mining engineers, all to be selected by judges of the County Court, and that each inspector is to give his whole time and attention to the duties of his office, his duties being prescribed in general terms; and it required the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employees of either mine in case the other should be abandoned and allowed to fill with water; but it did not specify the width of the pillar in any case, nor the method of fixing its width, save only that, as interpreted by the state court it committed the decision of those questions to a tribunal of experts, namely, the mine inspector for the district, and the engineers of the owner of the adjoining coal properties. Among other things, the court said:

> "The objections of plaintiff in error to the method of fixing the width of the barrier pillar are based upon the supposed uncertainty and want of uniformity in the membership of the statutory tribunal, and upon

the fact that the statute does not expressly provide for notice to the parties interested, that the procedure is not prescribed, and that there is no right of appeal.

"The legislature has not defined with precision the width of the pillar, and it is very properly admitted that, in the nature of things, this would have been impossible, because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule. *United States* v. *Grimaud*, 220 U. S. 506, 517-522, 55 L. ed. 563, 567-569, 31 Sup. Ct. Rep. 480. Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for the regulation of public service corporations are a familiar instance. *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 495, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. And it has become entirely settled that powers and discretion of this character may be delegated to administrative bodies, or even to a single individual." (Citing cases.)

It seems clear to us that the powers and discretion vested in the umpires in this case are not as broad as those which by the Pennsylvania act were vested in the engineers of the adjoining mine owners.

It being lawful for powers and discretion of the character of those described in the Pennsylvania statute to be delegated to even a single individual, that is, authority to

ascertain when it was necessary to fix the width of a barrier pillar on the line between two mining properties and to determine the width thereof, it seems to us that it must be lawful to go no further than has been done here in vesting authority in the umpire or the umpire and operators' committees. If this act, which was lawfully adopted and which, to be of practical benefit, must be enforced, is to be carried into effective execution, then the 3000 oil wells in the Greater Seminole area and the Oklahoma City pool, must be periodically gauged and the potentials of each thereof determined and recorded and the amount of the market outlets from each of the large number of pools must from time to time be determined, and computations made as to the respective percentages of relationship between the two. The Commission itself could not personally perform these duties.

The Commission itself determined from the evidence received by it at the hearing the amounts of potential production of the several pools and likewise the amount of the market demand for oil produced in each thereof. But as a basis for the determination by the Commission of the amount of the potentials, the gauges of the wells were directed to be made. The method of making these gauges is substantially set forth by the trial court in its Finding XXV (R. Vol. I, Pt. 2, pp. 200-205), to which we respectfully refer.

Prior to the taking of any gauge the umpire shall appoint a representative of an operator owning a lease adjoining the particular property to be gauged and notify the owner-operator of such appointment. It provides

that the owner-operator shall gauge the well and that the appointed representative of an adjoining operator shall witness the same. The power and discretion vested in the umpire to designate the person who shall witness the gauge does not operate to substantially distinguish this case from the *Plymouth Coal Company* case, particularly in the light of the fact that the two representatives are required to report in writing the result of the gauge and the fact that any producer who may be at all affected by the gauge taken had the right under the provisions of section 6 of the statute as well as under the provisions of the orders themselves to apply to the Commission for a hearing.

Counsel make quotation (plaintiff's brief, pp. 75-80) of certain parts of some of the orders of the Commission. They engage in no discussion thereof nor do they point out, unless it be perhaps by italicizing certain parts of the quoted language, wherein objectionable discretion was vested in the umpire or umpire and operators' committees.

With reference to the quoted provisions to the effect that in certain cases the umpire and operators' committees are authorized to fix the rate of curtailment necessary in certain areas, or to exercise any degree of discretion with reference to the enforcement of the orders, we wish to call attention to the fact that if there was discretion it was a discretion closely-controlled by the Commission, a public body, as evidenced by the concluding provisions (R. Vol. II, Pt. 2, pp. 16-17) in Order 5369, October 28, 1930, and the concluding provisions (R. *ibid*, 179) of Order 5413, December 30, 1930.

The concluding provision of Order 5369 is in part that

"when in the judgment of the umpire or operators' committee any adjustment or fixing of percentages of well production as provided in the order shall be proper, or as any supplementary or ancillary order shall become necessary, the facts supporting the necessity therefor and the reasonableness thereof shall be reported to the Commission for approval, and no exceptions to these rules and regulations shall be allowed by the umpire or operators' committee, or shall any adjustment of percentage of well production become effective, unless approved by such ancillary order of this Commission."

The concluding part of Order 5413, which has been continued in effect from time to time by subsequent orders, is to the same effect.

With reference to the authority vested by the Commission in the umpire and the operator as to the potential of his well in the event the operator and the witness had disagreed thereupon, we point to the fact that the determination of the amount of the potential of a well, whether it be done by the operator and the witness or the operator and the umpire, involves merely a calculation as to the number of barrels produced during the test period after deducting sediment and water as mentioned in said regulation (R. Vol. II, Pt. 2, bottom of p. 184). The order provides that in event of such disagreement, that is a disagreement as to the amount of oil produced during the test period, "the well shall be shut in at the close of the test, and the matter referred to the umpire" (p. 185). So that the amount of oil produced during the test would not be supplemented by any additional production from the well but

would remain in the lease storage tanks undisturbed, and could be immediately examined and measured by the umpire, and the correct quantity ascertained by the umpire. If the operator did not accept the umpire's calculation as correct, then the matter was to be referred to the Commission for determination (p. 185).

The isolated portions of the orders which counsel quote are to be construed and interpreted in connection with all other related provisions of the orders, including those which we have referred to above, and when this is done, it seems clear to us that the discretion, if any, and the power which was vested in these agents of the Commission, were so completely hedged about and controlled by the superior supervisory authority and power of the Commission that they contained no possible legally objectionable elements.

The umpires are not public officers.

The so-called "umpires" are in fact mere employees or agents of the Commission. That these agents are called "umpires" does not clothe them with the authority of a public officer.

Counsel for the plaintiff do not explain upon what theory they regard the umpires as public officers. They simply assert that they are officers and then that the legislature has no power to delegate authority in the Commission to create the office of umpire and prescribe the qualifications and duties thereof (plaintiff's brief, p. 80). They then, proceeding upon the assumption that they are officers, point to certain provisions of the Oklahoma statute which require officers to subscribe to an oath before entering upon the duties

of their respective offices, and providing that any person executing the functions of a public office without having taken the required oath is guilty of a misdemeanor, etc. (plaintiff's brief, pp. 84-87).

The primary distinguishing characteristics between an officer of a state or a municipal subdivision thereof, and an employee thereof, are stated in the case of *Metcalf* v. *Mitchell,* 269 U. S. 514, 520, 70 L. ed. 384, 390-391, where it is said:

> "An office is a public station conferred by the appointment of government. The term implies the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties and its compensation. *U. S.* v. *Hartwell,* 6 Wall. 385, 18 L. ed. 830; *Hall* v. *Wisconsin,* 103 U. S. 5, 26 L. ed. 302. The term 'officer' is one inseparably connected with an office; but there was no office of sewage or water supply expert or sanitary engineer to which either of the plaintiffs was appointed. The contracts with them, although entered into by authority of law and prescribing their duties, could not operate to create an office or give plaintiffs the status of officers. *Auffmordt* v. *Hedden,* 137 U. S. 310, 34 L. ed. 674. There were lacking in each instance the essential elements of a public station, permanent in character, created by law, whose incidents and duties were prescribed by law. See, *U. S.* v. *Maurice,* 2 Brock. 96; *U. S.* v. *Germaine,* 99 U. S. 508, 25 L. ed. 482; *Adams* v. *Murphy,* 91 C. C. A. 272, 165 Fed. 304."

The umpires were not appointed for any particular term or period of time and are subject to removal at the will of the Commission; proration itself is a temporary

measure designed to prevent waste and protect co-equal rights only so long as conditions in the oil pools require its maintenance; and the duties performed by the umpires may be dispensed with at any time by the Commission, although proration itself may not yet have been discontinued.

There is no statute of the state to which counsel point, and we find none, which expressly or impliedly requires employees or agents of the Commission to subscribe to an oath of office.

THE SALARIES OF THE UMPIRES.

The payment by the operators of the salaries of the umpires is not against public policy and the validity of their acts is not affected thereby.

The head-note on page 81 of plaintiff's brief states that the salary of Umpire Collins and of Umpire Bradford are paid by the operators committees. This is an error. They are paid by a majority of the oil producers in the prorated areas (Finding XXVI, R. Vol. I, Pt. 2, p. 206).

Counsel open their argument in support of their contention that the payment of the salaries of the umpires by private oil operators is against public policy and vitiates all their alleged official acts, with an assertion that the umpires cannot serve two masters, and the implication that they favor the producers who pay their salaries.

The plaintiff offered no evidence whatever tending to show that the umpires favor the producers who contribute to the fund out of which their salaries were paid.

The court below found (Finding XXVI), where it comprehensively covered the facts with reference to the appointment of the umpires by the Commission with the approval of the Governor, the services they render, the necessity for their appointment, and the payment of their salaries by a majority of the operators, the failure of the legislature to make any appropriation for said purpose, and concluded with a finding as follows:

> "While this method of compensating agents of the Commission is calculated to breed suspicion and distrust and destroy the confidence in the integrity of the Commission, *the evidence does not establish that such agents and employees, of the Commission, have been guilty of favoritism or dishonesty,* or that the Commission has acted arbitrarily or discriminated in favor of the group paying such agents, or that the plaintiff has suffered any injury by reason thereof, and the court finds no basis in the evidence for striking down the orders by reason of this practice."

This finding is not challenged in the plaintiff's statement of the points upon which it relies on the appeal herein (R. Vol. I, Pt. 2, pp. 406-411).

The fund out of which the salaries and expenses of the umpires are paid is raised by contributions made by the operators; in the case of the Seminole area for the payment of the salary and expenses of State-wide Umpire Collins, and in the case of the Oklahoma City pool for the payment of the salary and expenses of Assistant Umpire Bradford. Collins serves all of the prorated areas other than the Oklahoma City pool, and Bradford serves only the latter. In each case, the great majority of the pro-

ducers contributed to the fund; all of the producers are privileged to do so; and the payments which are made are made prorata on the basis of the production of each contributor to the total production (Finding XXVI, p. 206).

The Seminole area fund is collected and disbursed by the Carter Oil Company, and the Oklahoma City pool fund by the Oklahoma City Producers Association, the members of which do the contributing; it is not collected by the umpires (Collins, R. Vol. I, Pt. 2, p. 304).

In view of the unchallenged finding of the trial court that the umpires, as agents of the Commission, acted honestly and without favoritism, it cannot be fairly inferred that they were serving any master other than their principal, the Commission.

The trial court found (Finding XXVI) that:

> "The appointment of such agents was necessary for the purpose of properly and effectively administering the act and the rules and regulations thereunder. The Commission did not have a sufficient number of regular employees to care for the extra work entailed by the administration of the rules and regulations. No appropriation was made by law for the payment of the services of agents appointed under section 5 of the act. * * *
>
> "The method of compensating the umpire and his assistants * * * has been at all times known to the Commission and Governor, and was a matter of general knowledge. During that time there have been two sessions of the Legislature of Oklahoma, one beginning in January, 1929, and the other in January, 1931. The practice was not prohibited by the legislature and no fund otherwise provided for the payment of such agents."

The court, in said finding, further found that:

> "The said Collins and Bradford devote all their time to the employment by the Commission."

The magnitude of the work of supervising proration, clearly disclosed by the record in this case, required the active supervision of a qualified agent. Naturally, under the circumstances, those operators having the most at stake were willing to contribute to the salaries of said agents, while some of those whose interests were small may have been willing to take advantage of the services of the agents without making any contributions toward the payment of their salaries. The testimony is that some of them were not financially able to contribute. (McLennon, R. Vol. I, Pt. 2, pp. 301, 304.)

In said finding the court further found that the members of the operators committees serve without compensation. The operators committees here referred to should not as we have already suggested, be confused with the State-wide Proration Committee referred to in plaintiff's brief, in the statement of the case, as "a committee," "general committee," and "general advisory committee" (plaintiff's brief, pp. 12-16). The State-wide Proration Committee was not appointed by the Commission.

A separate operators committee was selected and appointed by the Commission to serve in each separate prorated pool, and it was composed of either individual producers therein or representatives of producing companies therein. It is these operators committees which are referred to in the various orders of the Commission. Counsel are

in error on page 75 of their brief when they state that the appointment of operators committees was not approved by the Governor. (See, Journal Entry No. 1795, June 30, 1930, R. Vol. II, Pt. 2, pp. 221-224; No. 1822, October 28, 1930, *ibid* 224-228; and No. 1835, *ibid* 228-231.)

The appropriations which were made by the legislature in various acts beginning in 1917 and ending in 1931, mentioned on page 83 of plaintiff's brief, were made for the salaries and expenses of the Chief Oil and Gas Conservation Agent and his assistants and stenographers operating in the Oil and Gas Department created by the Act of February 16, 1917. It will be observed from the tabulation which counsel have made that the appropriations made in 1917, nine years before any pool in the Greater Seminole area was discovered, amounted to $135,000 and no subsequent appropriation has been as large as that one, and also that appropriations of substantial amounts were made in 1921, 1923 and 1925, all prior to the discovery of the Seminole pool; and also that the amounts of the appropriations made in 1927, 1929 and 1931 were not substantially different from those made in previous years. There are, in addition to the act here in question, a number of acts of the Oklahoma Legislature relating to the conservation of oil and gas. They deal with the casing of wells, the wasteful utilization of gas, such as the burning of flambeau lights, requiring natural gas encountered in any well to be shut in and confined in the well in order to prevent it from wasting by escape; permitting unnecessary leaks in gas lines, and requiring the plugging of abandoned wells, and particularly, an act relating to the inspection of gasoline, kerosene

and other products of crude oil sold for industrial or domestic uses, all of which are under the supervision of the Chief Oil and Gas Conservation Agent. (See, Ch. 68, entitled "Oil and Gas," Secs. 7889-8017, C. O. S. 1921.)

It is contended (plaintiff's brief, pp. 82-83) that the Act of February 16, 1917 (App. (f), plaintiff's brief, p. 193), repealed that portion of section 5 of the act in question authorizing the Commission to employ and appoint, with the consent of the governor, such agents as may be necessary to enforce the act. We think it clear that a mere reading of the 1917 Act demonstrates the error in this contention. Section 2 thereof affirmatively provides that:

> "All authority and duties *now conferred upon the Corporation Commission* or other departments of the state government in reference to the conservation of oil and gas and the drilling and operating oil and gas wells and the construction and regulation of oil and gas lines, are hereby conferred *exclusively* upon the Corporation Commission."

The said act unquestionably preserved the authority conferred upon the Commission by section 5 of the 1915 Act. Such has been the interpretation placed upon this law by those charged with the duty of administering it, and this is entitled to great weight.

The use of the words "other departments of the state government," contained in the above-quoted section 2 of the 1917 Act, is fully accounted for by what is said by the Supreme Court of Oklahoma in the case of *Love* v. *Boyle*, 72 Okl. 300, 180 Pac. 705, which involved the validity of the 1917 Act, since it transferred authority and duties previ-

ously belonging to the Chief Mine Inspector and his department to the Corporation Commission.

To sustain their contention that the payment of these salaries by the producers is contrary to public policy, counsel quote several sections of the statutes of Oklahoma relating to the salaries and compensation of *public officers*. They also quote section 1579 which provides that the provisions "of this article" which relate "to executive officers" apply in relation to administrative officers in the same manner as if administrative and executive officers were both mentioned together.

These umpires are not public officers and they are not executive officers. Nor are they administrative officers, for they are not officers at all but only agents or employees of the Corporation Commission.

If the public policy of Oklahoma in respect of a *matter of the particular kind here in question* is to be found, as counsel for plaintiff contend it is, in the statutory provisions relating to compensation of officers, then we find that *it is definitely the state policy that they may be paid by the parties to be benefited by the services they render.*

Thus section 5545, C. O. S. 1921, provides that railway companies are authorized and empowered *at their own expense to appoint and employ* policemen in certain cases; and it provides also that such policemen shall have the authority of sheriffs, constables and peace officers in regard to the arrest and apprehension of certain offenders.

Said section reads as follows:

"5545. *Railway Companies May Appoint Police.*

Railway companies organized under the laws of this state, or doing business within the state, are hereby authorized and empowered at their own expense to appoint and employ policemen at such stations or other places on the lines of their railroads within this state, as said companies may deem necessary for the protection of their property, and the preservation of order on their premises, and in and about their cars, depots, depot grounds, yards, buildings or other structures; and said policemen shall have power and authority to arrest, with or without warrant, any person or persons who shall commit any offense against the laws of this state, or the ordinances of any town, city or other municipality, when such offense shall have been committed upon the premises of said companies, or in and about their cars, depots, depot grounds, yards, buildings and other structures; and shall also have the authority of sheriffs, constables and peace officers in regard to the arrest and apprehension of any such offenders, in or about the premises or appurtenances aforesaid; but in case of the arrest by said policeman of any person without warrant, they shall forthwith take such offender before some justice of the peace or other magistrate having jurisdiction, and make complaint against said offender according to law. Nothing herein contained shall be construed as restricting the lawful rights, powers or privileges of any sheriff, constable, policeman or peace officer within their respective jurisdiction, and for the official acts of such policeman or policemen the railroad company making such appointment shall be held responsible to the same extent as for the acts of any of its general agents or employees."

Thus again, section 6342, C. O. S. 1921, which deals with the appointment by sheriffs of under-sheriffs and deputies,

provides for the appointment of a special deputy sheriff for each organized Anti-Horse Thief Association lodge in his county; and that such deputy sheriff shall be compensated out of the fees earned by him.

Thus again, section 104, C. O. S. 1921, provides that the salary and expenses of the State Fire Marshal (whose office is created by section 92, he to be appointed by the governor) shall be defrayed by the fire insurance companies doing business in this state. The insurance companies are by said section taxed in the amount of one-fourth of one per centum on the gross premium receipts of all insurance companies to raise a fund to pay said salary and expenses. The salary and expenses of Collins and Bradford are raised according to a plan substantially the same as that set forth in said section. The only difference is that the contributions made by producers are not to be paid into the state treasury but rather into the hands of one of the interested producers, or the association of producers, who in turn pays the salary and expenses of the umpire out of said fund.

Section 104 was amended in 1923, and, as amended, reads as follows:

> "104. *Expenses—How Defrayed—Insurance Tax.* The salary and expenses incurred by the State Fire Marshal in the performance of the duties imposed upon him by the provisions of this act shall be defrayed by the fire insurance companies doing business in this state, and a tax of one-fourth of one per centum on the gross premium receipts of all such companies, is hereby levied for this purpose to be collected in the month of February of each year, by the insurance commissioner, as other taxes on insurance companies are collected. The insurance commissioner shall keep a sepa-

rate account of all moneys received, and pay the same to the state treasurer and shall include the same in his report. The money so received into the state treasury shall be set aside and appropriated as a special fund in such amount as is sufficient to meet the salaries herein provided and to take care of the contingent expenses of the office of the State Fire Marshal. *Provided,* such contingent expenses shall not exceed the sum of Ten Thousand ($10,000.00) Dollars per annum, for which an appropriation is hereby made, *provided,* the surplus of said fund shall be covered annually into the General Revenue Fund of the state. The state shall not be liable in any manner for the salary of the said Fire Marshal, his assistants, deputies and other employees, or for the maintenance of the office of Fire Marshal, or any expenses incident thereto and the same shall be payable only from the special fund provided for in this section."

And, again, section 9798, C. O. S. 1921, provides that the county commissioners of any county may contract with any person known as a tax ferret to assist in the discovery of property not listed and assessed for taxation and to fix his compensation not to exceed fifteen per cent of the taxes recovered. This section reads as follows:

"9798. *Contract and Compensation for Discovery.* The board of county commissioners of any county in this state may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed, as required by existing laws, and fix the compensation at not to exceed fifteen per cent of the taxes recovered under this article. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days'

notice thereof by registered letter, addressed to him at his last known place of residence fixing the time and place when objections in writing to such proposed listing and assessment may be made. An appeal may be taken to the County Court from the final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the District Court."

The "State Bar Act" is another instance. Lawyers must pay the expense of purifying the bar. This act was passed in 1929 and is contained in the Session Laws of 1929 as chapter 264. It constitutes an association known as "The State Bar," the members of which are to be all persons entitled to practice law in Oklahoma. A board of governors is provided for to consist of thirteen members, one member to be elected from each of nine geographic subdivisions of the state and four at large. The members of the bar nominate and elect the members of the board of governors. The expenses of maintaining and carrying on the work of the State Bar under this act are paid by the members of the bar who are members of "The State Bar." No one is allowed to practice law in the state unless he has obtained a certificate of membership in the State Bar; membership fee shall be $3.00, and section 42 provides that the annual membership fee shall be $5.00 and provides that the board of governors "shall have the power to increase such fee to a sum not exceeding $10.00." Section 28 provides that all fees paid under the act shall be paid to the state treasurer "and be placed in the state treasury in a separate and dis-

tinct fund to be known as 'The State Bar Fund'." Said section 28 then provides:

> "Money in said fund, or so much thereof as shall be necessary, shall be expended from time to time *in the payment of all necessary expenses incurred in effectuating the purpose of this act* upon warrants issued by the state auditor after the filing of proper vouchers or claims by the board of governors; *provided, however,* that no member of the board shall receive any other compensation than his necessary expenses connected with the performance of his duty as a member of the board." (Italics ours.)

Section 47 reads as follows:

> "It shall be the duty of the board of governors annually to have prepared a statement showing the total amount of receipts and expenditures of the State Bar for the 12 months preceding. Such statement shall be properly certified under oath by the president and treasurer to the chief justice of the Supreme Court of the State of Oklahoma."

Section 27 provides that the board of governors, subject to the laws of the state, shall have power to formulate and declare rules and regulations necessary or specified for the carrying out of the act; and section 29 provides that the rules and regulations adopted by the board when approved by the Supreme Court shall be binding upon all members of the bar, and that the willful breach of any of such rules shall be punished by suspension from the practice of law for a period not to exceed one year. Section 21 provides that:

> "*The board shall have the power and appoint such commissions, officers, and employees as it may deem*

necessary or proper, and fix and pay salaries and necessary expenses." (Italics ours.)

The State Bar Act sets up a plan whereby the members of the bar, they being the persons most vitally interested, are required to contribute to and maintain the expenses of the organization established by said act, which has as one of its primary purposes the protection of the public and of ethical members of the bar from unethical practices on the part of other members thereof. The cost of purifying the bar was thus cast in 1929 upon the members of the bar.

Thus it clearly appears that if we are to measure the legality of the plan of paying these umpires by an ascertainment of what the declared public policy of Oklahoma is in respect to the compensated officers or employees, either executive or administrative, then the conclusion is that said plan conforms to the declared public policy of the state in similar situations.

In addition to the foregoing, we find that the compensation of several officers of the state is paid, pursuant to statutory provision, by the collection of fees from the parties affected by the services they render.

This is true in the case of coroners. See sections 5884 and 5887, C. O. S. 1921. It is true in the case of "additional" deputy sheriffs appointed by the sheriff (in cases over and above appointments of lodge deputy sheriffs for each organized Anti-Horse Thief Association lodge, referred to above). See sections 6338, 6342 and 6343, C. O. S. 1921. This is true in the case of justices of the peace and constables. See sections 6432 to 6435, both inclusive, C. O. S.

1921. The compensation of the officers referred to in these cited sections consists solely of fees which they collect. Such fees are paid by the parties litigant, or in criminal cases by the complaining witness or the defendant, depending upon whether there has been a conviction, and, in certain events, a percentage thereof is paid by the county.

It is not an uncommon thing for the compensation of public officers to be made to depend on fees for services rendered or on commissions or monies officially passing through their hands. See, 22 Ruling Case Law, Public Officers, section 219. See, also, *United States* v. *Lawson,* 101 U. S. 11 Otto 164, 25 L. ed. 860; *United States* v. *McClean,* 95 U. S. 5 Otto 750, 24 L. ed. 579.

A somewhat analogous situation arose in *Montezuma Canal Company* v. *Smithville Canal Company,* 218 U. S. 371, 54 L. ed. 1074. In that case it was contended that the decree involved, appointing a water commissioner to distribute the water of a river among various irrigation canals according to adjudged priorities, *and making the parties liable pro rata for his salary,* transcended the bounds of judicial authority. The court rejected this contention and sustained the decree as valid. The fourth paragraph of the syllabus to the report of the case as contained in the Lawyers' Edition reads as follows:

> "4. The bounds of judicial authority are not transcended by the appointment by a court of a water commissioner charged with the duty of distributing the waters of a river among the various irrigation canals according to the adjudged priorities, and imposing upon the parties a *pro rata* liability for his salary."

In the opinion, the court pointed to the analogy between the decree and legislative enactments in some of the states where irrigation is practiced, to control and regulate the use of water for irrigating purposes, saying:

> "It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bear a peculiar resemblance to legislative provisions enacted in some of the states where irrigation is practiced, to control and regulate the use of water for irrigating purposes. See part 4, Weil's Water Rights in the Western States, pp. 590, *et seq.* The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Invest. Co.* v. *Carpenter*, 9 Wyo. 110, 50 L. R. A. 747, 87 Am. St. Rep. 918, 61 Pac. 258, 'to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriations to so divert and use the water'."

Thus we have shown that the arrangement for the payment of the salaries and expenses of Collins and Bradford neither violates public policy generally nor the public policy of the State of Oklahoma.

Therefore, certainly, the things which they have done in the performance of their duties cannot be said to be vitiated or in anywise affected by the arrangement under which they are compensated.

It is neither alleged nor is there a scintilla of proof

introduced in this case to show that either Collins or Bradford has ever done anything, either legally or morally wrong, in connection with the performance of their duties. In point of fact their conduct is above reproach, and this is shown by the evidence.

Furthermore, what we have said at other places in this brief applies here, namely, that the plaintiff in this case can not raise the point that the salaries and expenses of the umpires are not legally payable by the producers, and this for the reason that the plaintiff has not been injured by anything either of them has done.

INTERSTATE COMMERCE.

(a) ***Commerce among the several states begins and the regulating power of Congress attaches and that of the state ceases, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state, and terminates when the transportation is completed and the property has become a part of the general mass of the property in the state of its destination.***

—*In re Green*, 52 Fed. 104, 112;

Hammer v. *Dagenhart*, 274 U. S. 251;

Ed Reid v. *People of the State of Colorado*, 187 U. S. 137.

(b) ***The production of oil is not commerce, and the fact that it or its refined products are to be afterward shipped or used in interstate commerce does not make its production a part of such commerce.***

—*Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346;

Utah-Idaho Sugar Co. v. *Federal Trade Commission*, ... C. C. A. ..., 22 Fed. (2d) 122;

United Leather Workers International Union v. *Herkent & M. Trust Co.*, 265 U. S. 457, 68 L. ed. 1104;

Delaware L. & W. R. Co. v. *Yurkonis*, 238 U. S. 439, 444, 59 L. ed. 1397.

(c) ***To constitute an unlawful interference with interstate commerce, the state burden must be primary and direct and not secondary or indirect.***

—*West* v. *Kansas Nat. Gas Co.*, 221 U. S. 229, 55 L. ed. 716;

Pennsylvania v. *West Virginia*, 262 U. S. 553, 67 L. ed. 1117;

Foster-Fountain Packing Co. v. *Haydel*, 278 U. S. 1, 73 L. ed. 147.

(d) ***State laws regulating the production of oil, for the purpose of preventing waste, or of securing a fair and equitable distribution among those having co-equal rights to produce from a common source of supply, which effect a reduction in the amount shipped in interstate commerce, is only an indirect and remote obstruction to that commerce.***

(e) ***The laws of the State of Oklahoma and the orders of the Commission pursuant thereto do not in the slightest degree affect the sale or transportation in interstate commerce of a single barrel of oil lawfully produced in the state.***

Plaintiff assuming for the sake of the argument that the regulations are otherwise valid, asserts that they reduce the amount of oil that might otherwise reach the chan-

nels of interstate commerce and hence constitute an undue burden thereon. The facts relative to this question, as developed at the trial, are set forth in Findings of Fact XXVIII (R. Vol. I, Pt. 2, p. 209) and XXX (R. Vol. I, Pt. 2, p. 210). The subject is tersely discussed in the concluding paragraph of the opinion of the District Court (R. Vol. I, Pt. 2, p. 228).

It has been uniformly held that the mining of coal, manufacture of goods, production of beets, etc., and in general, that production or manufacture of goods is not commerce. Accordingly, it has always been held that the fact that commodities are to be afterward transported or dealt with in interstate commerce does not make their production or manufacture a part thereof. It is held, without exception, that the regulation of the production or manufacture of commodities, although intended for sale and transportation in interstate commerce, is within the police power reserved to the states, and Congress has not jurisdiction thereof. The jurisdiction of the state ends and that of the Congress attaches, when the transportation of the commodity from one state to another begins. The jurisdiction of Congress ends and that of the state again attaches when the transportation is finally ended, and the property has become a part of the general mass of the property of the state of its destination. The paramount jurisdiction of Congress exists from the beginning to the end of such transportation and exists at every stage thereof, or while, as this court has said, the commodity is in "the flowing stream from

one state to another, formed by a regular course of business." The jurisdiction of the states is excluded from the "flowing stream," only after its flow has commenced and until it ceases. Reference could be made to many decisions of this court as to the jurisdiction of the states under the police power to regulate the production and manufacture of goods intended to be entered in the stream of interstate commerce, and thus restrict the amount, or prevent any entering therein. We shall refer to but one, and ask the indulgence of the court to quote briefly. The subject was elaborately considered in *Kidd* v. *Pearson, supra.* In the course of the opinion it was said:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; * * *.
>
> "We find no provision in any of the sections of the statute under consideration, the object and purpose of which are to exert the jurisdiction of the state over persons or property or transactions within the limits of other states; or to act upon intoxicating liquors as exports. Its avowed object is to prevent, not the carrying of intoxicating liquors out of the state, but to prevent their manufacture, except for specified purposes, within the state. It is true that, notwithstanding its purposes and ends are restricted to the jurisdictional limits of the State of Iowa and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the state by lessening the

amount of intoxicating liquors exported. But it does not follow that because the products of a domestic manufacturer may ultimately become the subjects of interstate commerce at the pleasure of the manufacturer, the legislation of the state respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. * * *

"As has been often said legislation (by a state) may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution, 'unless under the guise of police regulations, it imposes a *direct* burden upon interstate commerce, or *directly* interferes with its freedom.' (Citing cases.)

"We have seen that whether a state, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer intends to export the liquors when made? Does the statute in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the state for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?

* * * * * * * * *

"This court has already decided that the fact that an article was manufactured for export to another state does not of itself make it an article of interstate commerce within the meaning of section 8, article 1 of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. We refer to the case of *Coe* v. *Errol*, 116 U. S. 517."

After reviewing the case cited, it was declared:

> "The application of the principles above announced to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a state is as broad and plenary as its taxing power; and property within the state is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

It must be borne in mind that the regulations here in question simply define the amount of oil that may be lawfully extracted from the common supply and reduced to possession as individual personal property under given conditions. The regulations do not in the slightest degree affect the sale or transportation of the oil after it is produced in accordance with the regulations. The one who lawfully acquires title as owner by extracting it from the common reservoir and reducing it to possession, is perfectly free to transport it all, or any part he chooses, from the state, or otherwise employ it in interstate or intrastate commerce. The destinction between such regulations and those condemned in the cases relied on by appellant is obvious. In *West* v. *Kansas Natural Gas Co., supra,* the state regulations in effect prohibited the transportation from the state of gas that had been rightfully produced and had become the personal property of the producer or the purchasers from him. In the opinion, the court very pertinently pointed out the distinction between such regulations governing the right to sell and transport gas *after* it had been reduced to possession, and regulations such as were involved in *Ohio Oil Co.* v. *Indiana* and *Lindsley* v. *National Carbonic*

Gas Co., and, we say, as in this case, regulating the right to produce and reduce to possession from a common source of supply. Regulations of a similar character, requiring preference in the use of gas *after* it is produced be given to local consumers, which had the effect of withdrawing a large volume from interstate commerce, were involved in *Pennsylvania* v. *West Virginia, supra.* The statute involved in *Foster-Fountain Packing Co.* v. *Haydel, supra,* involved the question, not of the right of the State of Louisiana to regulate the taking of shrimp, or canning thereof for market, because the law expressly permitted that, but of a regulation which forbade shipping raw and unshelled shrimp out of the state *after* it had been *lawfully* reduced to possession. The regulation was held invalid as a violation of the Commerce Clause.

Practically all the other authorities relied upon by appellant were reviewed by this court in the *Leather Workers* case (265 U. S. 457), *supra.* The question involved was stated in the opinion of the court by Chief Justice TAFT, as follows (p. 464):

> "The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-trust Act because such products, when made, were to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other states, in the *absence* of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products, when manufactured, from the

factories to their destination in other states, or with their sale in those states."

In the course of the opinion, the cases of *United Mine Workers* v. *Coronado Coal Co.*, (first appeal) 259 U. S. 407; *Lemke* v. *Farmers Grain Company*, 258 U. S. 51; *Swift & Co.* v. *United States*, 196 U. S. 375; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Stafford* v. *Wallace*, 258 U. S. 495; *Board of Trade* v. *Olsen*, 262 U. S. 1; *United States* v. *Patten*, 226 U. S. 540, cited by appellant, and many others were reviewed; the point decided in each was restated, and the conclusion to be drawn from all of them was stated as follows:

> "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce by the *illegal* or tortious prevention of its manufacture is ordinarily an *indirect and remote* obstruction to that commerce. It is *only* when the *intent or necessary effect* upon such commerce in the article *is to enable those preventing the manufacture to monopolize the supply, control its price, or discriminate as between its would-be purchasers*, that the *unlawful* interference with its manufacture can be said *directly* to burden interstate commerce."

There was and could be no finding that the intent or effect of the statute, or the orders of the Commission thereunder, was to enable the state *(a)* to monopolize the supply of oil, *(b)* control its price, or *(c)* discriminate between purchasers. That line of cases is clearly inapplicable to the *lawful* regulations of a sovereign state, or regulations under its authority having the force of law. They are applicable to *unlawful* conspiracies under the anti-trust laws,

and even then the intent or necessary effect must be as stated. There is nothing in the later cases of *Bedford Cut Stone Co.* v. *Journeymen S. C. Assn.*, 274 U. S. 37, or the second *Coronado* appeal, 268 U. S. 295, that can be said to constitute a departure from the principles so laid down. While we do not regard it as material, it might be well to call attention to what appears to be a misconception on the part of counsel for plaintiff as to the controlling question of fact that produced different results in the decision of the two appeals of the *Coronado* case. As we read their brief at pages 127 and 128, they seem to be under the impression that a difference in production of 5000 tons per week and of 5000 tons per day, was the controlling factor. We do not so understand the opinion. The controlling point was that of the sufficiency of the evidence to take the case to the jury on the question of *intent*. As we read the opinion on the second appeal bearing on the amount of production, beginning at page 308, it was very clearly stated that whether the amount be 5000 tons per week or 5000 tons per day, that circumstance *alone* was insufficient to show "an actual intent and plan on the part of defendants thereby to restrain interstate commerce," but that evidence taken at the second trial as to the amount of coal which the defendants prevented the plaintiff from producing, "was all relevant evidence for the jury to consider and weigh as a *circumstance* with the *rest of the new* testimony in proof of *intent* of the leaders of District 21 to prevent shipments to neighboring states of such an amount of non-union coal at non-union cost." The *new* evidence adduced at the second trial was set forth in the opinion.

Reference is made at page 124 of brief for appellant to a provision in some of the earlier orders prohibiting the purchase and transportation of oil produced in *violation* of the orders, as evidencing the intent of the Commission to actually burden interstate commerce. This is not repeted in subsequent orders and is no longer in force and was not in force at the time of the trial. In later orders beginning with Order 5369, December 30, 1930, the provision referred to reads: "that all purchasers and pipe line carriers of oil in the State of Oklahoma be and they are hereby forbidden to aid or abet producers in violating this order" (R. Vol. II, Pt. 2, p. 174). It is obvious that these regulations were designed as a measure to aid in securing compliance with ratable production. No such restraint is imposed on any lawful production had in accordance with the regulations. These provisions are certainly not worthy of consideration as evidence of intent to *directly* burden interstate commerce with respect to oil lawfully produced. Even if this provision as to oil produced in violation of law can be construed as having that effect and made for that purpose, it would not afford sufficient ground for striking down the entire order in which it is found, but only for restraining the enforcement of the particular provision at the suit of someone showing himself to be affected thereby. The power to prohibit the sale or shipment in interstate commerce of goods unlawfully manufactured or produced seems to have been recognized in *Kidd* v. *Pearson, supra.* In the opinion, it was said:

> "The main vice in this argument consists in the unqualified assumption that the statute legalizes the

manufacture. The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the state either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence."

We submit that the decision of the District Court on this question is correct.

ANTI-TRUST LAWS.

We fail to see any possible application of the portion of appellant's brief under this head. It is true that under Title 15, Sec. 26, U. S. C. A., private parties may now under certain circumstances, maintain a suit for injunctive relief, against threatened loss or damage by a violation of the anti-trust laws. But certainly in such suit the persons alleged to be engaged in the alleged combination or conspiracy are necessary parties. There are none such here. The persons, if such there be, are nowhere named.

Surely an unsupported statement in the brief, that certain companies who, according to Stock Exchange Manuals (not introduced in evidence), having a large capitalization, and who voluntarily contributed to funds raised to pay expenses of administration of the proration laws in amounts ranging from sixty-five cents to upwards of ten thousand dollars, each in proportion to his production, control the production of crude oil in the Mid-Continent field, and by themselves and through their subsidiaries dominate the oil industry in Oklahoma and Texas, is not sufficient basis for injunctive relief against them. The proceeding in the case

cited from one of the intermediate appellate courts of Texas was by the state against a corporation for forfeiture of its charter for alleged violation of the anti-trust laws of Texas. The proceeding was not against the city or any other party to annul the franchise alleged to have been secured in pursuance of the combination in violation of the statute.

We fail to see the relevancy of the abortive proceedings of producers in the Houston, Texas, Convention in 1929, to secure approval of the Federal Oil Conservation Board of a tentative plan to limit production, presumably throughout the United States, in 1929, to what it had been in 1928, or of the opinion of the Attorney General advising that the board had no jurisdiction over the matter, and stating that if such an agreement was voluntarily entered into, it would be investigated with a view to ascertaining whether there had been a violation of the anti-trust laws.

The Oklahoma law in question had been enacted more than fourteen years before that, and proceedings had been instituted under the provision of the act by interested parties, and rules had been promulgated by the Commission carrying the act into effect in the Seminole field more than a year before the Houston Convention. The fact that the plan of proration set forth in the long-since superseded order of June 30, 1930 (quoted p. 139, appellant's brief), was submitted to the parties interested in protecting their correlative rights, and approved as just and fair by all except one, proves nothing but that the Commission was endeavoring to administer the law fairly and equitably, and that practically all those affected were satisfied with the regulations made for the protection of their co-equal rights.

In this connection, appellant again quotes from the colloquy between Judge KENNAMER and Mr. West, who appeared at the trial as a representative of the governor. The governor was not a party to the case, though notified of its pendency as required by the statute. It appears that Mr. West was afforded the opportunity of filing a brief, though none of the counsel for appellees have ever seen it. Through the courtesy of court and counsel, Mr. West was given the opportunity to make an oral argument. We have no idea upon what fact, if any, Mr. West based the statement that the law was being administered under monopoly. Certainly, his opinion so expressed is not binding on the parties to the suit, either as an admission against interest or otherwise.

The complete answer to all of appellant's contentions and insinuations under this heading is found in the findings of fact of the District Court. The correctness of these findings is not questioned in this court. We refer particularly to Findings XXVII and XXX (R. Vol. I, Pt. 2, pp. 209-210). See, also, our discussion under "No Domination by Major Companies," and "Price Fixing."

Conclusion.

For the reasons stated we respectfully submit that there is no merit in the points relied on by plaintiff-appellant in No. 485, and that it is not entitled to any of the relief it seeks at the hands of this court.

Brief on Cross Appeal.

Statement.

The appellees in No. 485 have perfected an appeal from that part of the final decree (R. Vol. I, Pt. 2, p. 248) which adjudged sections 8 and 9 of the so-called "Curtailment Act" or "Oil Conservation Act" (Sec. 7961, 7962, C. O. S. 1921) to be invalid, and perpetually enjoined the proper officers of the state from enforcing the same.

In the majority opinion (R. Vol. I, Pt. 2, pp. 218, 222, 228), the District Court held that these sections provide penalties for violation of the statute, and do not provide penalties for violations of the rules and regulations promulgated by the Commission thereunder. It was further held that the provisions of the statute were too general (in the absence of specific rules and regulations by the Commission) to be sustained as a penal statute, and since the sections were not in terms applicable to violations of the Commission's rules and regulations, that neither section could be invoked in aid of the enforcement of either the statute as such, or the rules and regulations of the Commission.

While the District Court treated the two sections together in the opinion and conclusions of law [par. (16), R. Vol. I, Pt. 2, p. 216], the assignments of error deal with the two sections separately, and for the reason that one section is penal in character and the other is not, it is necessary that the assignments as affecting each section be separately presented.

The definite statement of points to be relied upon appear in the record (R. Vol. I, Pt. 2, pp. 412-414).

Specification of Such of the Assigned Errors as Are Intended to Be Urged in No. 486. *(R. Vol. I, Pt. 2, p. 394.)*

Defendants below, appellants in No. 486, in their assignments of error, say the court below erred:

1. The court erred in its sixteenth conclusion of law, in holding that section 8, providing punishment by fine and imprisonment for direct or indirect violations of the provisions of the Act of the Oklahoma Legislature approved February 11, 1915, entitled, "An Act defining and prohibiting the waste of crude oil or petroleum, providing for the equitable taking of the same from the ground and conferring authority on the Corporation Commission, prescribing the penalty for the violation of the act and declaring an emergency," being section 7961, Compiled Oklahoma Statutes 1921, provided in terms a penalty for violation of the act only, and not for violations of the Orders, Rules and Regulations of the Commission made pursuant to the act for the purpose of carrying it into effect.

2. The court erred in not holding and decreeing that valid orders, rules and regulations of the Corporation Commission made pursuant to the act for the purpose of carrying it into effect, became a part of the act, and that violations of such orders, rules and regulations constitute a violation of the act within the meaning of said section 8.

3. * * *

4. * * *

5. The court having found in its Finding of Fact No. XXVI, that, "no prosecution has been commenced against

the plaintiff or any of its officers, agents or employees under section 8 of the act," and not having found that such prosecution was threatened, or contemplated, it erred in construing said section and pronouncing judgment upon its validity; and further erred in not holding and decreeing that the construction and validity of said section 8 did not properly arise in this suit.

6. * * *

7. The court erred in its said decree entered September 11th, 1931, adjudging that said section 8 of said Act of the Oklahoma Legislature approved February 11th, 1915, being section 7961, Compiled Oklahoma Statutes 1921, is not valid, and perpetually enjoining and restraining J. Berry King, Attorney General of Oklahoma, and Lewis R. Morris, County Attorney of Oklahoma County, Oklahoma, and each of them, their servants and employees, from enforcing or attempting to enforce the provisions of said section 8 of said act, or any part thereof.

8. The court erred in its sixteenth conclusion of law, in holding that the provisions of section 9 of the Act of the Legislature of the State of Oklahoma, approved February 11th, 1915, being section 7962, Compiled Oklahoma Statutes 1921, for the appointment of a receiver for the operation only of producing wells and marketing the product thereof, of any person violating the provisions of the act, by a court of competent jurisdiction at the suit of the state through the Attorney General, or any County Attorney, imposes a penalty.

9. The court erred in its sixteenth conclusion of law, in holding that section 9 of the Act of the Oklahoma Legislature approved February 11, 1915, being section 7962, Compiled Oklahoma Statutes 1921, in terms imposes a penalty for violations of the act only, and may not be invoked to secure the appointment of a receiver to operate the producing wells and market the production therefrom of any person, firm or corporation violating the orders, rules and regulations of the Commission made pursuant to the act for the purpose of carrying it into effect.

10. The court erred in not holding and decreeing that valid orders, rules and regulations of the Corporation Commission made pursuant to the act for the purpose of carrying it into effect, became a part of the act.

11. * * *

12. The court erred in its sixteenth conclusion of law, in holding that sections 1, 3, 4, 5 and 6 of the said Act of the Legislature of the State of Oklahoma, approved February 11th, 1915, being sections 7954, 7956, 7957, 7958, and 7959, Compiled Oklahoma Statutes 1921, are too indefinite and uncertain as penal provisions to warrant the appointment of a receiver as provided by section 9 of the said act, being section 7962, Compiled Oklahoma Statutes 1921, for violations thereof, as distinguished from violations of the orders, rules and regulations of the Commission.

13. * * *

14. The court not having found that there is any pending proceeding for the appointment of a receiver pursuant to the provisions of section 9 of said Act of the Legislature

of the State of Oklahoma approved February 11, 1915, being section 7962, Compiled Oklahoma Statutes 1921, it erred in construing said section and pronouncing judgment upon its validity; and further erred in not holding and decreeing that the construction and validity of said section 9 did not properly arise in this suit.

15. • • •

16. The court erred on its said decree entered September 11th, 1931, adjudging that said section 9 of said Act of the Oklahoma Legislature approved February 11th, 1915, is not valid, and perpetually enjoining and restraining J. Berry King, Attorney General of Oklahoma, and Lewis R. Morris, County Attorney of Oklahoma County, Oklahoma, and each of them, their servants and employees, from enforcing or attempting to enforce the provisions of said section 9 of said act, or any part thereof.

ARGUMENT.

Section 8 of the Act (Sec. 7961, C. O. S. 1921).

Assignments of Error I to VII, Inc. (R. Vol. I, Pt. 2, pp. 394, 395, 396.)

This section provides:

> "That in addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or *indirectly* violating the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand ($5000.00) dollars, or by imprisonment in the county jail not to exceed thirty (30) days, or by both fine and imprisonment."

In Finding of Fact XXXI (R. Vol. I, Pt. 2, p. 212) it is recited:

> "No prosecution has been commenced against the plaintiff or any of its officers, agents or employees under section 8 of the Act."

There was no finding that such prosecution had been threatened.

During careful readings of the third amended bill we failed to note any allegation that any criminal prosecution under section 8 was contemplated by the defendants or other officer of the state, either for alleged violation of any provision of the act, or any rule or regulation of the Commission. There was no evidence tending to show that such prosecution was threatened or contemplated.

It will be noted that under section 10 the invalidity of any section shall not in any manner affect the validity of the remainder of the act. It should be borne in mind that the primary object of this suit is to test the "constitutionality of said act passed by the Oklahoma Legislature, and approved on Feb. 11, 1915, and the validity of the orders, rules and regulations of the Corporation Commission made and entered pursuant thereto" (Par. XXXIV, Third Amended Bill, R. Vol. I, Pt. 1, p. 31). This suit was instituted by plaintiff for that purpose September 15, 1930, before it had produced any oil in excess of its just proportion as prescribed by the statute. Indeed, it appears that the complainant produced the first oil from the Oklahoma City field in September, 1930 (Finding IV, R. 181).

The rule appears to be clearly established by this court that,

(a) ***Until an attempt is made to enforce the penalty clauses of a statute, if severable from the remainder thereof, there is no occasion to pass upon their validity.***

In *Ohio River and W. R. Co.* v. *Dittey*, 232 U. S. 576, 594, 58 L. ed. 737, 746, this court said:

> "Finally, it is contended that the act is unconstitutional because of the severity of the penalties imposed for withholding the tax. But *these actions do not involve any present attempt to enforce the penalties;* and the act contains a section (160) which in terms declares: 'The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof.' *The pen-*

alty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity." (Citing cases.) (Italics ours.)

In *Grand Trunk R. Co.* v. *Michigan R. Com.*, 231 U. S. 457, 473, 58 L. ed. 310, 319, this court said:

"But the provision for penalties is in a section by itself *and when their enforcement is attempted their constitutionality can then be determined.*" (Italics ours.)

See, also:

Rail and River Coal Company v. *Yaple*, 236 U. S. 338, 350, 59 L. ed. 607, 616;

Phoenix R. Co. v. *Geary*, 239 U. S. 277, 282, 60 L. ed. 287, 289;

Grenada Lumber Co. v. *Mississippi*, 217 U. S. 433, 443, 54 L. ed. 826, 831;

Western Union Telegraph Company v. *City of Richmond*, 224 U. S. 160, 172, 56 L. ed. 710, 717.

The District Court recognized this rule in refusing to pass upon the validity of the provision of section 6 of the statutes authorizing the Commission to punish as for contempt a violation of its orders. In the opinion (R. Vol. I. Pt. 2, pp. 218, 225) that court said:

"The Commission has not invoked that provision of the act for the enforcement of the proration orders against the plaintiff and the validity of such portion of section 6 is not here presented."

In assuming to construe section 8 and pronounce judgment on its validity as construed by it, the District Court must have confused this section with the proceedings once

initiated by the Attorney General under section 9, hereafter referred to, and lost sight of the fact that no attempt had ever been made by anyone to prosecute the complainant or any of its officers, agents or employees under section 8.

Attention is respectfully called to the fact that adherence to the foregoing rule is particularly desirable in this case.

The District Court, by construction, limited the scope of this section to those matters only which could be determined from the face of the statute unaided by any question determined by the Commission under the authority thereof. The section, as so construed, was held invalid. The construction of state statutes is primarily one for the state courts. In determining whether any right secured by the Federal Constitution is violated by a state statute, the national courts must accept the construction of the statute by the highest court of the state and regard it as part of the provision. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73. The courts of Oklahoma have not yet had occasion to construe this particular section. While, if necessary to the decision of a case within its jurisdiction, the national courts are not precluded from construing a state statute because it has not been construed by the state court, yet, it would seem proper not to unnecessarily construe state statutes and pronounce judgment of their validity as so construed.

It may very well be that the state court, in obedience to the mandate requiring it to construe all statutes, penal as well as remedial, liberally with a view to effect their ob-

jects (Sec. 3563, C. O. S. 1921) will feel constrained to construe this section as sufficiently comprehensive to include those who produce oil in excess of their statutory proportion when the factors have been determined by the Commission pursuant to the provisions of the statute.

If the court should disagree with us on this point, then we submit that,

(b) ***Under a proper construction of the act as a whole, the production of oil in excess of the statutory proportion prescribed by the act, when the number of barrels constituting the respective statutory factors has been determined by the Commission, constitutes a violation of the act, and affords a sufficiently definite and certain standard of conduct for a penal statute.***

It will be noted that the Act (Sec. 4) directly limits the amount an operator may produce from a given source of supply, when the full production therefrom may be had only under conditions constituting waste, as defined in section 3 (*e.g.*, when the full production exceeds the reasonable market demands) to that proportion of the amount that may be produced without waste (*e.g.*, the reasonable market demand) which the full production of the wells of such operator bears to the total production of such common source of supply.

Under section 6, jurisdiction is conferred on the Commission to determine any question relating to the enforcement of the act. When the Commission has determined the questions of the amount that may be produced without waste (*e.g.*, the market demand) from a given source of

supply, the total production therefrom, and the full production of the wells of the various operators, then the production of oil by an operator from his wells in excess of the proportion fixed by section 4 of the statute constitutes a violation of the act, and not merely a violation of a Commission's order as held by the District Court.

It might very well be that failure to observe some independent regulation of the Commission, such as filing daily reports of production as required by Par. 3 (1) of Order No. 5414 (R. Vol. II, Pt. 2, p. 187), would constitute merely a violation of an order of the Commission and not a violation of the act within the purview of section 8. See *United States* v. *Eaton*, 144 U. S. 677. But it seems clear that the production of oil in excess of the proportion prescribed by section 4, where the sole function performed by the Commission is to ascertain and supply the actual figures for the statutory formula, constitutes a violation of the act, rather than a violation of an order of the Commission.

When the quantity of oil that may be produced from a given source of supply, without waste, the total production thereof, and the full production of the wells of an operator, have been ascertained and declared by the Commission, the factors are supplied from which the operator can readily calculate the amount of oil the statute (Sec. 4) permits him to produce, thus supplying a definite and certain standard by which he may regulate his conduct. Production of oil in excess of the statutory proportion of the full production of his wells constitutes a violation of the provisions of the act.

Let us consider the application of the act particularly to that feature prohibiting waste incident to production of oil in excess of reasonable market demands. Section 4 should be construed in connection with sections 3, 5 and 6. When the appropriate provisions of the last mentioned sections are interpolated at the proper place in section 4, it will read as follows:

> *Sec. 4.* "That whenever the full production from any common source of supply" (as determined from gauges taken under rules and regulations prescribed by the Corporation Commission pursuant to section 5) "can only be obtained under conditions constituting waste as herein defined" (that is to say, when such full production is in excess of reasonable market demands, as provided in Sec. 3, and determined by the Commission pursuant to Sec. 6) "then any person, firm or corporation, having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom without waste" (the reasonable market demand as so determined by the Commission) "as the production of the well or wells of any such person, firm or corporation" (as so determined by said gauge) "bears to the total production" (as so determined by said guage) "of such common source of supply."

So construed, there is not anything indefinite or uncertain about the amount of the oil that may be produced from a given well. The standard of conduct is sufficient for a criminal statute.

In *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348, 62 L. ed. 763, 768, this court in passing upon the Idaho sheep-grazing statute, said:

"*Second:* It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guaranty by the 14th Amendment of due process of law, *since it fails to provide for the ascertainment of the boundaries of a 'range,' or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the act.* Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash* v. *United States,* 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; *Miller* v. *Strahl,* 239 U. S. 426, 434, 60 L. ed. 364, 368, 36 Sup. Ct. Rep. 147." (Italics ours.)

The ascertainment of the percentage of the potential of one's well which by section 4 he may lawfully produce is not left to his own investigation and inquiry into the facts by which it is to be determined, and hence he cannot in any case be in doubt as might one violating the Idaho statute (held to be sufficiently definite); but, it is ascertained for his information by a duly constituted agency of the state; and, when it is so found out, the agency doing that thing does not instruct him (except *per forma)* what percentage he may produce, for the statute itself does so.

The well owner is a party to the proceedings conducted by the Commission under section 6 at and by which the percentage is ascertained, so that he cannot fail to know in advance of its ascertainment, for his information.

When a person produces oil in excess of that amount, how can it be said that he has not been guilty, in the exact language of section 8, of "directly or indirectly violating the provisions of this act"?

We, therefore, respectfully submit that so much of said final decree as enjoins the enforcement of section 8 should be reversed.

Section 9 of the Act (Section 7962, C. O. S. 1921).

Assignments of Error VIII to XVI (R. Vol. I, Pt. 2, pp. 396, 397, 398.)

This section reads as follows:

> "That in addition to any penalty imposed under the preceding section, any person, firm or corporation violating the provisions of this act, shall be subject to have his or its producing property placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the state through the Attorney General or any county attorney, but such receivership shall only extend to the operating of producing wells and the marketing of the production thereof, under the provisions of this act."

All that was said in the foregoing discussion of the assignments relating to section 8, is applicable here, unless referring to the first point, *(a)*, there made, but not to the second, *(b)*, the court should be of the opinion that the proceedings which had been instituted by the Attorney General for injunction and the appointment of a receiver and subsequently dismissed, rendered it necessary that the validity of this section be determined. There was no proceeding of any kind under section 9, pending at the time of the trial,

and there was no finding that the Attorney General was threatening to renew such proceedings, and there was no evidence to that effect.

The circumstances relating to the institution of proceedings under section 9 and the abandonment thereof are set forth in Findings of Fact III (R. Vol. I, Pt. 2, p. 179), IV (R. 180) and XXXI (R. 211). In substance they are as follows:

The Champlin Refining Company drilled a well known as McCalep No. 1 (R. Vol. I, Pt. 2, p. 181) on five lots in Roosevelt Place Addition to Oklahoma City, with an area of .48 of an acre (R. Vol. I, Pt. 2, p. 179). The recoverable oil in that area was 33,000 barrels per acre (R. Vol. I, Pt. 2, p. 181). Therefore, the recoverable oil originally underlying these five lots was 15,480 barrels. Prior to February 9, 1931, 28,664 barrels of oil was produced from this well, or more than 13,000 barrels in excess of the recoverable oil originally in place under these lots. That company also drilled a well known as Naden No. 1 on four lots in Armourdale Addition (R. 181) with an area of 1/2 acre (R. 179). The recoverable oil at that location was 27,000 barrels per acre (R. 181). Therefore, the total recoverable oil originally in place under these lots was 13,500 barrels. In the month of September alone, 13,953 barrels of oil were produced from this well, a little in excess of the recoverable oil originally underlying them. Not being satisfied with production at the rate permitted by the statute, although it permitted taking more oil than was originally in place under its properties, and desiring to produce oil from its wells without restriction, the company applied to the District

Court in this suit for a temporary injunction, which was denied on February 9, 1931 (R. Vol. 1, Pt. 1, p. 3). Thereafter, in disregard of the statute and findings of the Commission thereunder, determining the market demand, potential of the field, and rates of allowable production, and notwithstanding the denial of a temporary injunction against the enforcement of the act and orders of the Commission pursuant thereto, the company proceeded to produce oil from these wells in excess of the amount permitted by the statute and findings of the Commission. From February 9, 1931 (the date of the order denying the temporary injunction) to the institution of proceedings by the Attorney General, it produced 214,682 barrels from McCalep No. 1, and 196,577 barrels from Naden No. 1. The company completed two wells in March, 1931, known as Seal No. 1 and Seal No. 2 on two blocks in Compton Park Addition (R. 181) having an area of five acres. The recoverable oil at the location of Seal No. 1 was 13,000 barrels per acre, and at No. 2, 7,500 barrels per acre, or an average of 10,250 barrels per acre, making the recoverable oil for the five-acre tract 51,250 barrels. Prior to institution of the proceedings by the Attorney General, 153,292 barrels were produced from these two wells (R. 181), almost three times as much as the quantity of recoverable oil originally in place under the two blocks. This production of 564,551 barrels from these four wells on these small tracts during the period from February 9 to May 28, 1931, not only was largely drawn and drained from adjacent properties, but was greatly in excess of the amount allowed at the statutory rate. In its third amended bill, the company admitted that it

"produced approximately 300,000 barrels of crude oil from its wells in the Oklahoma City field in excess of the amount it would have been entitled to produce if the Curtailment Act of 1915 and the Commission's orders herein referred to are valid." (R. 30)

Under these circumstances, the Attorney General felt that it was his duty to employ the means provided by law to protect the rights of other producers to a just distribution of the recoverable oil in the pool as provided by the statute. On the last mentioned date he instituted an action in the state court designed to secure the future operation of these wells, and production of oil therefrom in accordance with law. To that end, he asked that a receiver be appointed to operate the wells, and pending a hearing on the application, that the company be restrained by injunction from further violations. The injunction was granted. The company thereupon made application to the District Court in this suit to restrain the enforcement of this section and the penalty sections of the act pending the final determination of the suit. An order was made to that effect on June 13, 1931, on condition that a bond be given to pay the damages sustained by any person by reason of the violation of the proration orders in the event they were finally adjudged to be valid (R. Vol. I, Pt. 2, p. 373). The bond was given. The Attorney General thereupon and some time before the trial of this cause, dismissed the action in the state court. Subsequently, on application of other interested parties, the order of June 13 was vacated (R. Vol. I, Pt. 2, p. 375).

We submit that under these circumstances and the authorities heretofore cited, it was not necessary upon trial and final decision of this suit to construe section 9, and determine whether under its provisions the state could employ the remedy of receivership to secure compliance with a valid law and valid orders made under authority thereof for the purpose of carrying it into effect. Those questions can be determined in a suit that may hereafter be brought for the purpose of securing the appointment of a receiver and any right of the defendant therein, arising under the Federal Constitution, or otherwise, may then be fully protected.

However, if this court should be of the opinion that the question properly arose in this case, and the decision thereof was necessary to a final disposition of the cause, then, we respectfully submit that the District Court erred in its interpretation and determination of the validity of this section.

(c) *Section 9 does not impose a penalty as punishment for past violations of the act, but is a civil remedy, of the class of injunction and mandamus, that may be invoked by the state to secure compliance with the law.*

The District Court, throughout its opinion, denominated the provisions of section 9 for the appointment of a receiver, as a *penalty* section. As imposing a penalty, the section was strictly construed, and it was held that in view of the language, "violating the provisions of this act," there was excluded from the purview of this section any order, finding or determination of the Commission made

under authority of the act, and that proceedings could not be maintained under this section for production of oil in excess of the statutory rate, calculated on the determination by the Commission of the market demand, and total production from the common source of supply. For reasons heretofore suggested, we think this construction is erroneous.

It has been frequently held that either mandamus or injunction is an appropriate remedy to enforce compliance by a carrier or other utility with rates fixed, or other regulation prescribed by statute, or rule of a commission to whom the power has been delegated. Statutes expressly so providing are not uncommon. It will hardly be said that such remedy is one penal in character. There are many striking points of resemblance between the branch of the jurisdiction of equity to appoint receivers and that which is involved in granting injunctions. The two remedies are alike branches of the general preventive jurisdiction of courts of equity, and are prospective rather than retrospective in their operation, being invoked for the prevention of future injuries rather than for the redress of grievances already committed. The common object of each is preventive rather than punitory in its purpose. Neither remedy has the effect of changing title. The difference is that receivership may prove effective, where injunction might fail. Both remedies rest to a considerable extent in the sound judicial discretion of the court to which the application is addressed, to be governed by a consideration of all the circumstances of the case. Ordinarily, a receiver

will not be appointed where an injunction will afford ample protection. The section in question simply declares that violations of the act for the prevention of waste and to secure fair and equitable taking from a common source of supply is ground for a receivership. It is a measure designed to secure future compliance with the law and not to punish for past offenses. It has been held that even in the absence of express statutory authority, a court of equity may appoint a receiver in aid of injunction to take charge of property used in violation of law. *Columbia Athletic Club* v. *State,* 143 Ind. 98, 40 N. E. 914, 52 Am. St. Rep. 407, 28 L. R. A. 727.

This section having made violation of the provisions of the act a ground for receivership, the procedure is necessarily governed by the statutes of the state applying to receiverships generally. This is found in article XIX, ch. 3, C. O. S. 1921. Under that article, the court must require of the receiver a bond in an adequate amount and with sufficient surety. Provision is made for appeals from interlocutory orders of appointment. It is obvious that the producing wells would be operated by the receiver under the direction of the court in compliance with the law. The proceeds of oil produced are not confiscated to the state, but go to the owner of the well. The remedy is effective to secure operation of producing wells in accordance with law, but it is in no sense drastic. The only pecuniary loss that could possibly be suffered by the owner is the cost of the proceeding. Title to the property remains in the owner; the proceeds of its operation, less expenses, go to him. When the owner of wells operates them in violation of law, he is

temporarily deprived of their control, to the end that others may not suffer further injury by unlawful operations. Obviously, as soon as a receiver is no longer necessary to secure that end, he would be discharged.

It is not at all certain that any order or finding of the Commission is a condition precedent to the institution of proceedings by the Attorney General or the County Attorney under section 9. The total or full production of the common source of supply is a mere matter of mathematical calculation from the gauges taken under the rules and regulations of the Commission (Sec. 5). The market demand is a matter ascertainable by inquiry among purchasers. Any operator, of course, knows the production of his own wells. It is not a difficult matter for any operator to ascertain for himself the amount of oil the statute (Sec. 4) permits him to produce from his wells. It may very well be that an operator should not be required at the peril of criminal penalties, such as provided by section 8, to determine whether, in the operation of his wells, the amount of oil produced exceeds the proportion permitted by the statute; but in a proceeding under section 9, in the absence of findings or previous determination by the Commission as to market demand, and full production of all wells, any issue as to those facts may be determined therein, and if it appears that the operator will operate his wells in accordance therewith, the court, in the exercise of a sound discretion, would no doubt refuse to interfere with the control of the wells by the appointment of a receiver.

In any event, after the Commission has, in the exercise

of the jurisdiction conferred by section 6, determined the reasonable market demand for oil from a given common source of supply, and the full or potential production of the wells producing therefrom, all the necessary factors are supplied, and any operator may know with certainty the amount of oil he may produce under the provisions of section 4. Production in excess of that amount is a violation of the provisions of the act, and not a violation of a Commission order. The findings of the Commission simply supply a determination of the facts, upon which the statute operates. The act of the operator in producing oil excessively is an act prohibited by the statute, not by order of the Commission. The Commission has power to determine the market demand and the full production, and the effect of such determination is to make production in excess of the statutory ratio, based upon the factors thus established, a violation of the act. In addition to the decision in the Idaho case cited above we cite *Anton Caha* v. *United States*, 152 U. S. 211, 218.

To hold that production in excess of the statutory proportion, calculated upon the statutory factors, as established by findings of the Commission, is not a violation of the provisions of the act, appears to be not only an extremely strict construction of the section, but one that is unreasonably so, and one calculated to defeat rather than promote the legislative intent.

We respectfully submit that so much of the decree as enjoins the enforcement of section 9, should be reversed.

In conclusion, it is respectfully submitted that the decree of the District Court should be affirmed in so far as it sustains the validity of sections 1, 3, 4, 5, 6, and 10 of the act in question and the orders of the Commission made thereunder, and in denying plaintiff's application for an injunction; and that said decree be reversed in so far as it held sections 8 and 9 of said act to be invalid and enjoined their enforcement.

Respectfully submitted,

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